
ARTICLES

JUDICIALLY STRAIGHT? *BOY SCOUTS* V. *DALE* AND THE MISSING SCALIA DISSENT

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INTRODUCTION

Was Justice Scalia's vote in the *Boy Scouts* case¹ judicially straight?² For years he has championed the view that a general conduct law not specifically directed at First Amendment interests does not implicate the First Amendment even if it happens to restrict First Amendment activity in some of its applications. Thus, when Oregon evenhandedly enforced its drug-control law against religious and nonreligious uses of peyote, Scalia maintained that the First Amendment was not implicated,³ and when Indiana evenhandedly enforced its public indecency law against expressive and nonexpressive public nudity, he took the same position.⁴ But in the *Boy Scouts* case, when New Jersey evenhandedly enforced its civil rights law against expressive as well as nonexpressive discrimination,⁵ Scalia not only thought that the law implicated the First Amendment, but he also provided the fifth vote to invalidate it as applied.⁶

When the Court handed down its decision in *Boy Scouts*, one could fairly have wondered whether Scalia's dissent was missing.⁷ Since the

1. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (invalidating a state civil rights law as applied to prohibit the Boy Scouts from expelling an openly gay man on the basis of his sexual orientation). Much of the argument in this Article could apply with equal force to Justice Thomas, but as Justice Scalia has been at the forefront in developing his own view of First Amendment law, I have chosen to focus exclusively on him.

2. Cf. *id.* at 649 (quoting portion of Scout Oath requiring boy scouts to keep themselves "morally straight").

3. See *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

4. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572-81 (1991) (Scalia, J., concurring).

5. See *infra* Part III-B.

6. See *Boy Scouts*, 530 U.S. at 642 (syllabus; noting 5-4 division).

7. See, e.g., Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650-51 (2001). Tribe notes:

There remains the mystery of why a neutral rule of general applicability, such as the New Jersey law against discrimination . . . , should give way to any First Amendment objection, whether one involving association or otherwise, simply because the rule has the incidental effect, as applied to a particular group, of interfering with its freedom of expression. After all, the Court did not apply heightened First Amendment scrutiny when a neutral rule about keeping promises or paying damages to those who relied detrimentally on them was employed to uphold a monetary award against a newspaper for publishing the name of a source to whom it had promised secrecy. Similarly, Justice Scalia has successfully championed an analogous rule for the free exercise of religion in [*Smith*]. Further, in [*Barnes*], Justice Scalia demonstrated that the Court . . . had never actually invalidated a neutral general rule of conduct as applied to a violation of the rule that happened to express something.

Id. (citations omitted). For a critique of Professor Tribe's suggested solution to the mystery, see *infra* Part III-B-1. I use the word *dissent* ironically of course, for if Scalia had in fact dissented from the ma-

civil rights law at issue could have been characterized as a general law not directed at First Amendment interests, Scalia's decision to join the majority opinion invalidating the law's enforcement on First Amendment grounds appeared to conflict with the First Amendment philosophy he developed in *Employment Division v. Smith*,⁸ *Barnes v. Glen Theatre, Inc.*,⁹ and similar cases.¹⁰ In what may be called his *Smith* jurisprudence, Scalia has maintained that, so far as the regulation of conduct is concerned, heightened judicial scrutiny should be reserved for circumstances in which a law specifically targets First Amendment interests for disfavored treatment.¹¹ Otherwise, accommodation of those interests should ordinarily be left to the political process.¹² Scalia did not seem to adhere to that philosophy in *Boy Scouts*.¹³

The mere appearance of inconsistency, however, does not necessarily establish an actual inconsistency. It is true that the *Boy Scouts* majority applied heightened scrutiny after determining only that enforcement of the law at issue would "significantly affect" expression¹⁴—making no further determination that the law specifically targeted expression. But the decision differed, at least in its theory of the case, from *Smith*, *Barnes*, and similar cases. The *Boy Scouts* majority framed the case as a matter of expressive association,¹⁵ governed by *Roberts v. United States Jaycees*¹⁶ and

majority opinion in *Boy Scouts*, the majority would have lost its fifth vote, and Scalia would have provided the four dissenters with the fifth vote they needed to affirm the New Jersey Supreme Court's decision rejecting the constitutional challenge.

8. 494 U.S. 872 (1990).

9. 501 U.S. 560 (1991) (Scalia, J., concurring).

10. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307–10 (2000) (Scalia, J., concurring) (applying his *Barnes* approach); *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part) (defending *Smith*); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557–58 (1993) (Scalia, J., concurring in part and concurring in the judgment) (applying *Smith*); *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622–27 (D.C. Cir. 1983) (Scalia, J., dissenting) (previewing his *Smith* jurisprudence), *rev'd sub nom. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

11. See, e.g., *Barnes*, 501 U.S. at 576.

12. See *Smith*, 494 U.S. at 890.

13. Cf. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001) ("When a law is otherwise constitutional, and when an actor has not been singled out *because of* his expression, the actor has no free speech claim. The Boy Scouts were not singled out in this way.").

14. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (emphasis added).

15. *Id.* at 644 ("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."). The Boy Scouts had based its principal argument on the freedom of speech. See Brief for Petitioners at 20–30, *Boy Scouts* (No. 99-699) (lead argument).

16. 468 U.S. 609 (1984).

its progeny.¹⁷ These precedents expressly endorsed heightened scrutiny even in the absence of specific targeting of expression,¹⁸ as did *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,¹⁹ another decision on which the Court relied.²⁰ In *Hurley*, the Court invalidated an attempt to enforce a ban on sexual-orientation discrimination in a context arguably analogous to that presented in *Boy Scouts*.²¹ The reliance on *Roberts* and *Hurley* complicates the attempt to infer actual inconsistency from Scalia's vote. Indeed, he had joined the unanimous opinion in *Hurley* several years after his formulation of the *Smith* jurisprudence, although he had also expressly reaffirmed the *Smith* jurisprudence only three months before the decision in *Boy Scouts*.²²

This complexity illustrates why a superficial comparison of Scalia's *Smith* jurisprudence with his vote in *Boy Scouts* (as well as in *Hurley*) only raises a question as to his actual consistency but does not answer it. This Article explores the appearance of inconsistency in greater depth in order to either reject or strengthen an inference of actual inconsistency. Part I introduces Scalia's *Smith* jurisprudence and briefly contrasts it with the majority opinion in *Boy Scouts*. As more specifically outlined at the end of Part I, Parts II, III, and IV examine various theories for harmonizing Scalia's *Smith* jurisprudence with the majority opinion in *Boy Scouts*. Although some of these theories require extrapolation and one or more of them tend toward an explanation of Scalia's vote, none seems capable of rationalizing the appearance of inconsistency. In fact, certain features of the majority opinion itself reinforce the inference of Scalia's actual inconsistency with his own jurisprudence. The better view is that Scalia's vote in *Boy Scouts* was not consistent with his own First Amendment jurisprudence.

I. THE APPEARANCE OF INCONSISTENCY

Scalia's vote in *Boy Scouts* appears to be inconsistent with his *Smith* jurisprudence because in the latter he staked out a very deferential position toward conduct regulations incidentally restricting First Amendment inter-

17. *N.Y. State Club Ass'n, v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

18. *See, e.g., Roberts*, 468 U.S. at 623–24.

19. 515 U.S. 557 (1995).

20. *See, e.g., Boy Scouts*, 530 U.S. at 653–54, 658–59.

21. *See, e.g.,* Brief for Petitioners at 19, *Boy Scouts* (No. 99-699) (“[T]his case is controlled by the Court’s recent, unanimous decision in *Hurley* . . .”).

22. *See City of Erie v. Pap’s A.M.*, 529 U.S. 277, 307–08 (Scalia, J., concurring) (reaffirming his *Barnes* concurrence).

ests. Scalia has even acknowledged that for First Amendment purposes, general laws regulating *discriminatory* conduct do not differ from other conduct regulations.²³ Yet he silently joined a majority opinion in *Boy Scouts* that assumed a far less deferential stance toward governmental regulation of discriminatory conduct than his *Smith* jurisprudence would seem to authorize. In this Part, I survey both Scalia's *Smith* jurisprudence and the majority opinion in *Boy Scouts* and close by proposing some theories, which I examine in later Parts, that might harmonize the two.

A. INCIDENTAL RESTRICTION OF EXPRESSIVE CONDUCT

In adjudicating First Amendment challenges to conduct regulations, courts face the same challenge as Cubist painters. These artists grappled with the fact that one object can simultaneously display multiple aspects when viewed from different perspectives. Likewise, conduct that exhibits an expressive aspect when viewed from a First Amendment perspective can simultaneously disclose a legitimate regulatory evil when viewed from a regulatory perspective. Burning a draft card, to take a classic example,²⁴ can both communicate an antiwar message and simultaneously destroy a government-issued document that may be an integral part of an administrative scheme.²⁵

When the government attempts to regulate conduct because of the perceived harm flowing from a nonexpressive aspect of the conduct, courts can find themselves squarely in what might be called the "Cubist dilemma." A regulation that restricts conduct for legitimate reasons related to the nonexpressive aspect will simultaneously produce an incidental restriction of the expressive aspect. When individuals challenge such a regulation as a violation of the First Amendment, courts must decide whether to give primacy to the nonexpressive or expressive aspect of the conduct and uphold or invalidate the regulation. Courts cannot, like Cubist painters, transcend physical reality and simultaneously liberate the expressive aspect

23. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992) (Scalia, J.) Here, Scalia noted that

sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Id. (citations omitted). See also *infra* Part III-B-1.

24. See *United States v. O'Brien*, 391 U.S. 367 (1968).

25. See *id.* at 378–80 (describing administrative purposes of draft cards).

and restrain only the nonexpressive aspect of the same act. Courts must choose.²⁶

In *United States v. O'Brien*,²⁷ the Warren Court formulated what remains the controlling standard for making that choice when a conduct-regulation produces an incidental restriction of expression.²⁸ *O'Brien* presented the case of the expressive draft-card burner. The government prosecuted an antiwar activist who burned his draft card as an act of symbolic protest. The federal law under which he was convicted generally prohibited the deliberate destruction of draft cards whether done to express an idea or done nonexpressively to, for example, vent anger or attempt to frustrate one's own induction.²⁹

Addressing the protestor's First Amendment defense to his prosecution under the law, the Court faced the Cubist dilemma and reasoned that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."³⁰ As the Court saw it,³¹ the federal law at issue was designed not to punish the act's expression of antiwar opinion (the "speech" element) but to punish the act's destruction of an integral component of the draft system (the "nonspeech" element). In the supposed absence of deliberate censorship, the Court concluded, strict scrutiny was too high a standard of review. But the law's incidental restriction of expression nevertheless justified a form of intermediate scrutiny.³² The Court might not have

26. The Court has struggled with this dilemma since at least 1879, when it affirmed the conviction of a Mormon for violating a federal ban on polygamy in the territories. *See Reynolds v. United States*, 98 U.S. 145, 166 (1879).

27. 391 U.S. 367, 376 (1968).

28. *See Rubinfeld, supra* note 13, at 771 ("*O'Brien* remains the leading case in this area. It continues today to furnish the basic structure for First Amendment analysis of 'expressive conduct.'").

29. *See O'Brien*, 391 U.S. at 370 (quoting law as subjecting to criminal liability anyone "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate"); *id.* at 375 (The law "prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views."). For a standard for distinguishing expressive from nonexpressive conduct, see *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), which defines symbolic speech as conduct *intended* to communicate a message and being *objectively understood* as such.

30. *O'Brien*, 391 U.S. at 376.

31. There was some evidence that suppressing antiwar dissent was the government's motive in enacting the measure at issue. *Id.* at 385-86. *See also* Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15 ("What emerges with indisputable clarity from an examination of the legislative history of the amendment is that the intent of its framers was purely and simply to put a stop to this particular form of antiwar protest.").

32. *See O'Brien*, 391 U.S. at 377. The Court held that

been able to transcend physical reality, but with a middling level of scrutiny it attempted to strike a balance that would protect the expressive aspect of the conduct when the government's interest in regulating the nonexpressive aspect of the conduct was insubstantial or where the regulation of the nonexpressive aspect was so blunt that it unnecessarily restricted the conduct and, with it, the expressive aspect of the conduct.

Scalia, in contrast, has taken a quite different approach to the Cubist dilemma—one that essentially disregards the presence of the expressive aspect so long as the law under review has disregarded it too. Scalia has repeatedly argued for this kind of approach. Although his position was presaged by a dissenting opinion he filed as a Circuit Judge in 1983,³³ it clearly appeared in his Supreme Court jurisprudence in the early 1990's. First with freedom of religion³⁴ and then with freedom of speech,³⁵ Scalia embraced the view that laws regulating conduct because of some harmful, nonexpressive aspect trigger no heightened scrutiny even where those laws incidentally restrict First Amendment interests by simultaneously interfering with an expressive or religious aspect of the same conduct. So long as the government enacts general laws not specifically directed at the expressive aspects of conduct, only the minimal scrutiny required by basic Fourteenth Amendment principles applies.³⁶ The mere fact that a law in some of its applications might incidentally restrict First Amendment activity is constitutionally irrelevant.

On the Supreme Court, Scalia first articulated this view in *Employment Division v. Smith*,³⁷ where he persuaded a narrow majority of the Court to largely abandon *Sherbert v. Verner*,³⁸ a Warren Court precedent that, much like *O'Brien*, had subjected conduct regulations to heightened scrutiny³⁹ if they even incidentally restricted religious practices. In *Sherbert*, the Court held that a state could not constitutionally disqualify a Sabbatarian from receiving unemployment compensation even though she

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

33. See *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting) *rev'd sub nom.*, *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288 (1984).

34. See *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

35. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572–81 (1991) (Scalia, J., concurring).

36. *Smith*, 494 U.S. at 872–78.

37. *Id.* at 872 (1990).

38. See 374 U.S. 398 (1963).

39. See *id.* at 403.

failed to satisfy a general programmatic requirement that recipients be available for potential work on Saturdays. It was irrelevant under the statutory scheme that her reason for unavailability on Saturdays was religious; the benefits-disqualification regulated the nonreligious aspect of refusals to work on Saturday. Nevertheless, the Warren Court held that even such incidental restriction of religious practice triggered strict scrutiny⁴⁰—a rule more protective of religion than *O'Brien* is of expression.

Smith presented a classic example of an incidental restriction of religious practice, but Scalia led the Court to a different resolution of the problem than the Warren Court had developed. In *Smith*, two members of the Native American Church were denied unemployment compensation after having been fired from their jobs for ingesting peyote as part of a religious ceremony. They challenged the denial of benefits as an infringement of their rights to the free exercise of religion, just as the Sabbatarian had done in *Sherbert*.⁴¹ Reasoning that the outcome of the unemployment compensation challenge depended on whether the state could constitutionally make it a felony for the challengers to possess peyote,⁴² the Court addressed the broader question whether the First Amendment forbade the state to enforce its drug laws against peyote possession that was incident to the practice of religion.

Writing for the majority, Scalia said no. In a landmark opinion for the Court, he distinguished laws that are specifically directed at the religious aspect of conduct from general laws that regulate that aspect only incidentally as a side-effect of regulating some nonreligious aspect of the conduct. He acknowledged that it would violate free exercise rights if the govern-

40. See *id.* at 409–10. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, the Court likewise held that a state could not enforce its compulsory school attendance law against Amish teenagers because high school attendance would gravely endanger their religious faith. See *id.* at 218. It stated:

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Id. The Court did not conclude that the object of the compulsory school attendance law was to undermine the Amish faith, but it nevertheless applied strict scrutiny to the attempt to apply the general law to Amish parents. See *id.* at 220–21.

41. See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”). See also *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (incorporating Free Exercise Clause into Fourteenth Amendment).

42. *Employment Div. v. Smith*, 485 U.S. at 670 (1988) (“[I]f a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.”).

ment “sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”⁴³ But he rejected the contention of the *Smith* challengers (relying on *Sherbert*) that “their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.”⁴⁴ As Justice Scalia summed up the majority’s new view, “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”⁴⁵ That the valid law might in some of its applications restrict a religious practice made no difference.⁴⁶

A year later in *Barnes v. Glen Theatre, Inc.*,⁴⁷ Scalia extended that approach to governmental regulation of expressive conduct, although not for a majority of the Court. As in *Smith*, *Barnes* involved only the incidental restriction of expression. In *Barnes*, two adult establishments and their erotic dancers challenged the enforcement of a state’s public nudity ban, which required the dancers to refrain from total nudity during their performances.⁴⁸ The challenged law made it a crime for anyone to appear “in a public place . . . in a state of nudity.”⁴⁹ Although the law prohibited public nudity regardless whether an individual intended the nudity to convey a message, the Court considered whether enforcement of the law against individuals whose public nudity was expressive might violate the First Amendment.⁵⁰ In other words, the question was whether a regulation of public nudity geared toward a nonspeech aspect of the conduct could be enforced as applied to public nudity that also displayed an expressive aspect. The case presented another example of the Cubist dilemma where the law in question produced only an incidental restriction of expressive conduct.

43. *Smith*, 494 U.S. at 877.

44. *Id.* at 878. *Smith*, then, largely abandoned the effect-triggered scrutiny of *Sherbert*. Although the *Smith* Court did not expressly overrule *Sherbert*, Justice Scalia’s majority opinion so drastically limited its reach as to render it little more than an aberration having virtually no continuing vitality. The vast majority of cases arising after *Smith* will be governed by its required showing of impermissible targeting in order to sustain a free exercise challenge.

45. *Id.* at 878–79.

46. *See id.* Justice Scalia reiterated this position three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557–59 (1993) (Scalia, J., concurring in part and concurring in judgment).

47. 501 U.S. 560 (1991).

48. *See id.* at 562–63.

49. *Id.* at 569 n.2 (quoting statutory definition).

50. *See id.* at 570–71.

In a concurring opinion, Scalia concluded that such a general regulation could be applied even to expressive nudity. In his view, the case turned on the fact that the government was only incidentally restricting expressive nudity in the course of prohibiting all public nudity, whether expressive or not. If a public-nudity ban “targeted only expressive nudity, while turning a blind eye to nude beaches[,]” he conceded, such a law would probably violate the First Amendment.⁵¹ But since the challenged law was “a general law regulating conduct and not specifically directed at expression,” it “was not subject to First Amendment scrutiny at all.”⁵² As he summed up the practical implication of his approach, “those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden.”⁵³ The resonance of *Smith* was obvious.

In contrast to *Smith*, however, Justice Scalia was unable to persuade a majority of his colleagues to adopt his view. Although a majority joined him in rejecting the constitutional challenge in *Barnes*, a plurality did so only after applying the intermediate scrutiny required by *O’Brien*. In *Barnes* as in *Smith*, Scalia rejected the broader interpretation of the First Amendment, and in *Barnes* he repudiated *O’Brien* by name. In his view, it was unreasonable for challengers to expect the Court to apply heightened scrutiny based solely on a showing of incidental restriction of their expressive conduct.⁵⁴ As in *Smith*, Scalia insisted that the Court apply heightened scrutiny only after a challenger demonstrated that any interference with First Amendment interests had been the government’s object, not merely an incidental effect of a generally applicable and otherwise valid regulation. Significantly, one should keep in mind that Scalia’s repudiation of *O’Brien* means that whenever the Court relies on that precedent, the Court is analyzing a case in a way that conflicts with Scalia’s *Smith* jurisprudence, as he extended it to expressive conduct in his *Barnes* opinion.

With his opinions in *Smith* and *Barnes*, then, Scalia has articulated a judicial response to the Cubist dilemma that differs significantly from the response formulated by the Warren Court in *Sherbert* and *O’Brien* and ad-

51. *Id.* at 574.

52. *Id.* at 572 (Scalia, J., concurring).

53. *Id.* at 580-81.

54. *Id.* at 576-77. For instance, Scalia stated that [i]t cannot reasonably be demanded . . . that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, *see, e.g., United States v. O’Brien* . . . (1968)—that it be justified by an ‘important or substantial’ government interest.

Id.

hered to by the court in the latter cases. Whether or not a general conduct regulation produces an incidental restriction on religious practice or expressive conduct, Scalia denies that the First Amendment is implicated at all. Specific targeting of those interests is what, in Scalia's view, raises a presumption of unconstitutionality and triggers some form of heightened First Amendment scrutiny.

B. VIGOROUS SCRUTINY IN *BOY SCOUTS*

Justice Scalia's development of his *Smith* jurisprudence may explain why the lead attorney defending the enforcement of New Jersey's civil rights law in *Boy Scouts* opened his oral argument with the following assertion: "The State of New Jersey has a neutral civil rights law of general applicability that is aimed at discriminatory practices, not expression."⁵⁵ But if that opener was a play for Scalia's vote, it failed. Scalia joined the majority opinion invalidating the law as applied to the Boy Scouts—and joined a majority opinion that applied a vigorous, if ambiguous, measure of judicial scrutiny.

Boy Scouts involved New Jersey's attempt to enforce its civil rights law⁵⁶ to prohibit the Boy Scouts from expelling James Dale as an adult member and volunteer scout leader because he was openly gay. The organization learned of Dale's sexual orientation when a local newspaper published a story about a seminar held at Rutgers University, where Dale was then enrolled. The article included a photograph of Dale, identified him as the co-president of a gay student group at Rutgers, and quoted from an interview in which he discussed the importance to gay teenagers of having gay role models.⁵⁷ A few weeks after the article appeared, the Boy Scouts informed Dale of his expulsion. The stated grounds were "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals."⁵⁸ Dale eventually sued the Boy Scouts under New Jersey's civil rights law and ultimately prevailed in the state supreme court, which held the expulsion to be unlawful discrimination on the basis of sexual orientation.

55. Transcript of Oral Arguments at 20, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

56. N.J. STAT. ANN. § 10:5-1 to 10:5-49 (West 2001). The law is officially known as the Law Against Discrimination. *Id.*

57. See *Boy Scouts*, 530 U.S. at 645; *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204–05 (N.J. 1999).

58. *Boy Scouts*, 530 U.S. at 665. (quoting letter from the Boy Scouts to Dale).

The Boy Scouts challenged the law as applied, arguing that the state-mandated inclusion of Dale violated the organization's First Amendment rights of speech and expressive association.⁵⁹ Although articulated in a va-

59. Dale's case was only one of a number of cases in which the Boy Scouts have raised statutory and constitutional barriers to the inclusion of not only gay men, but of girls, women, atheists, and religious objectors. For other cases involving the exclusion of gay men as scout leaders, see *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998); *Merino v. San Diego County Council of the Boy Scouts of Am.*, Nos. D021969 & D022829, 1997 WL 1145151 (Cal. Ct. App. May 21, 1997) (unreported), *cert. denied*, 525 U.S. 1018 (1998); *Lanzi v. Boy Scouts of Am.*, No. 1037581 (Cal. Super. Ct. filed Dec. 6, 2000) (LEXIS, CA Superior Court Civil Case Index—Santa Barbara County); *Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts.*, 809 A.2d 1192 (D.C. 2002); *Chicago Area Council of Boy Scouts of Am. v. Chicago Comm'n on Human Relations*, 748 N.E.2d 759 (Ill. App. 2001) (gay man seeking paid position). Of these, the *Lanzi* case was perhaps the most infamous, if not the most highly publicized. It involved a paid, professional scout leader, Leonard Lanzi, who came out as gay in the midst of a vigorous defense of the organization in a hearing before a local government body that was considering a measure to withdraw the city's support from the organization because of its exclusion of gay men. In response, the Boy Scouts fired Lanzi. See Sally Ann Connell, *Scout's Ban on Gays Splits Community*, L.A. TIMES, Mar. 5, 2001, at A3 (describing case); Mary O'Gorman, *The Santa Barbara County HRC Confronts the Boy Scouts Policy of Discrimination*, THE CONNECTION: NEWSLETTER OF THE CALIFORNIA ASSOCIATION OF HUMAN RELATIONS ORGANIZATIONS, Winter 2000, available at http://www.cahro.vwh.net/html/winter_2000_6.html (same). See also *Gay Ex-Leader Settles Suit Against Boy Scouts*, L.A. TIMES, Jun. 16, 2001, at B10 (noting confidential settlement of employment discrimination suit).

For cases involving the exclusion of girls and women, see *Minnesota ex rel. Beaulieu v. Boy Scouts of Am.*, D.C. File No. MX 92-07717 (D. Minn. Aug. 6, 1992) (girl seeking to become scout); *Mankes v. Boy Scouts of Am.*, 137 F.R.D. 409 (S.D. Fla. 1991) (same); *Yeaw v. Boy Scouts of Am.*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997), *review dismissed*, 960 P.2d 509 (Cal. 1998) (same); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) (same); *Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Hum. Rights & Opportunities*, 528 A.2d 352 (Conn. 1987) (woman seeking to become scout leader). For accounts of the Minnesota case, see Maureen M. Smith, *Bloomington Girl Can't Be a Boy Scout, Judge Rules*, MINNEAPOLIS STAR TRIB., Aug. 7, 1992, at 1B; *Larry King Live* (CNN television broadcast, May 29, 1992) (interviewing the Minnesota girl and her mother). To the Boy Scouts' credit, it amended its policies in 1988 to permit women to serve as scout leaders. See Jay Mathews, *Boy Scouts Allow Women Troop Leaders*, WASH. POST, Feb. 14, 1988, at A16. It nevertheless continues to discriminate against girls.

For cases involving the exclusion of atheists and religious objectors, see *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993) (boy denied scout membership for declining to take religious oath); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 453 (Cal. 1998) (scouts who declined to take religious oath); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (atheist removed as scout leader); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of Am.*, Doc. No. P-3986 (Pa. Hum. Relations. Comm'n July 27, 1999) (woman denied position as scout leader for refusing to take religious oath). See also *Geolas v. Boy Scouts of Am.*, 23 F. Supp. 2d 1254 (D. Kan. 1998) (apparent religious objector removed as scout leader).

Boy Scouts' executives apparently described these exclusions as involving the "three G's:" girls, gays, and the "godless." See *Pool v. Boy Scouts of Am.*, Nos. 93-030 (PA), at *13 (D.C. Comm'n on Hum. Rts. June 21, 2001), available at <http://www.glaa.org/archive/2001/poolandgellerruling0621.pdf> (last visited Aug. 3, 2002), *rev'd on other grounds sub nom. Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts.*, 809 A.2d 1192 (D.C. 2002). The organization also appears to have resisted application of civil rights laws in at least one case of alleged race discrimination. See *Adams v. Boy Scouts of Am.*, No. 3CV98-313, 2000 WL 33671779, at *5 (E.D. Ark. Jan. 5, 2000) (unreported) (observing in race discrimination case that the law was unset-

riety of ways, the Boy Scouts' First Amendment arguments all turned on the claim that "homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed."⁶⁰ Scouts and scout leaders were required to adhere to both the Scout Oath and Law, which, as interpreted, Dale had failed to do. Furthermore, it was a scout leader's job to inculcate the organization's viewpoint "by example as much or more than . . . by proscription."⁶¹ Relying principally on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*⁶² and to a lesser extent on *Roberts v. United States Jaycees*,⁶³ the Boy Scouts argued that because "an organization cannot speak except through its agents," the state-mandated inclusion of Dale as a scout leader would "violate the organization's right to control its own message and to avoid association with a message with which it does not agree."⁶⁴

The Court agreed, although relying more heavily on *Roberts* than had the Boy Scouts. In invalidating New Jersey's civil rights law as applied in Dale's case, the majority employed a vigorous, if uncertain, level of scrutiny. Once this scrutiny was triggered—the precise trigger to be considered below—the majority held that the First Amendment required the Court to weigh the expressive interests of the challenger against the governmental interests in regulation, apparently with a very heavy thumb on the challenger's side of the scale.⁶⁵ Although literally providing no analysis whatsoever of the governmental interests supporting New Jersey's civil rights law, the majority announced that those interests (whatever the majority silently imagined them to have been) "do not justify such a severe intrusion on the Boy Scouts'" First Amendment rights.⁶⁶ This sort of balancing clearly applied more than minimal scrutiny, and since the majority ex-

ted as to whether Boy Scouts was subject to antidiscrimination law), *aff'd*, 271 F.3d 769, 778 (8th Cir. 2001) (noting Boy Scouts' argument that facility at issue was not subject to antidiscrimination law).

60. Brief for Petitioners at 6, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (quoting 1991 internal memorandum). The Boy Scouts also pointed out that the organization's publicly disseminated materials, while silent as to gay sexuality, emphasized marriage and fatherhood by noting that

[t]he Boy Scout Handbook describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his responsibility to himself. "Abstinence until marriage," the Handbook counsels, "is a very wise course of action."

Id. at 4–5 (citations omitted).

61. *Id.* at 3–4.

62. 515 U.S. 557 (1995).

63. 468 U.S. 609 (1984).

64. Brief for Petitioners at 19, *Boy Scouts* (No. 99-699).

65. *Boy Scouts*, 530 U.S. at 658–59.

66. *Id.* at 659.

pressly distinguished *O'Brien*,⁶⁷ it apparently amounted to more than intermediate scrutiny.⁶⁸ However the balancing approach may have compared to the levels-of-scrutiny hierarchy, clearly it was far from deferential.

What was curious about Scalia's decision to join in applying this heightened scrutiny was the limited nature of the preliminary determination that triggered the scrutiny. Under the majority's reasoning, vigorous scrutiny was appropriate because enforcement of New Jersey's civil rights law would "significantly affect" the Boy Scouts' expression.⁶⁹ By requiring the organization to put "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform,"⁷⁰ the New Jersey law would, "at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁷¹ Whatever one may think of this reasoning, it did not amount to a determination that New Jersey's civil rights law was specifically directed at expression, as Scalia required in his *Smith* jurisprudence. The fact that enforcement of the law may have "significantly affected" the Boy Scouts' expression was no different from the circumstance in *Smith*, for example, where criminalizing peyote use significantly affected the religious practices of Native Americans as an incident of an otherwise valid conduct regulation. What Scalia required in that case, as well as in *Barnes*, was a showing that interfering with First Amendment interests had been "the *object* of the regulation of conduct," not "merely the incidental *effect* of forbidding the conduct for other reasons."⁷² It is this tension between a challenger's heavy burden under Scalia's *Smith* jurisprudence and the trip-wire application of heightened scrutiny in *Boy Scouts* that creates the appearance that Scalia's vote in the latter was inconsistent with his highly restraintist First Amendment philosophy in the former.

67. *See id.* at 659. For discussions of the Court's attempt to distinguish *O'Brien*, see *infra* Parts III-B and IV-B.

68. Actually, given the ambiguous nature of the ad hoc balancing in which the Court engaged, it is quite possible to argue that what the Court really applied was precisely the intermediate scrutiny required by *O'Brien*. Given the utterly unpersuasive nature of the Court's attempt to distinguish *O'Brien*, see *infra* Parts III-B and IV-B, one may characterize the superficial attempt at a distinction as necessary in order to enable Scalia to join the majority opinion. He had, after all, expressly repudiated *O'Brien*. On this view, the purported distinguishing of that case was completely disingenuous and designed merely to create the impression that Scalia's vote in *Boy Scouts* remained consistent with his repudiation of *O'Brien*.

69. *See Boy Scouts*, 530 U.S. at 656.

70. *Id.* at 655-56.

71. *Id.* at 653.

72. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (emphasis added).

C. HARMONIZING *BOY SCOUTS* AND *SMITH*

A mere appearance of inconsistency, however, does not necessarily establish the existence of it. The apparent tension between *Boy Scouts* and Scalia's *Smith* jurisprudence is only superficial without closer analysis of both, particularly the latter. There are a number of theories that might harmonize Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence, but each requires some degree of additional analysis, to which Parts II, III, and IV of this Article will turn.

Part II takes into account the way in which the Court framed and decided the constitutional question in *Boy Scouts*. By organizing its opinion around *Roberts* and its progeny, the majority employed a theory based on the implied First Amendment freedom of expressive association, rather than a more direct or conventional speech paradigm. In *Roberts*, the Court at least nominally established strict scrutiny as the appropriate standard of review in expressive association cases,⁷³ regardless whether a challenged law was directed at or only incidentally restricted expressive association.⁷⁴ *Roberts*, then, formally adopted a standard of review that was comparable to *Sherbert* in the religion context and stricter than *O'Brien* in the speech context, both of which Scalia has repudiated in his *Smith* jurisprudence. The first theory for harmonizing Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence, however, rests on the notion, as a general proposition, that freedom of association is distinguishable from and entitled to greater protection than the freedoms of religion and speech or, at least that Scalia might feel bound by *stare decisis* to continue the strict scrutiny mandated by *Roberts* in the association context.

Assuming that theory fails to harmonize Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence, Part III attempts to harmonize the two by applying the *Smith* jurisprudence to the facts of *Boy Scouts*. Although the majority opinion did not determine that New Jersey's civil rights law was

73. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.")

74. *See id.* at 623–24. The court observed as follows:

We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.

On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views. . . .

Id. (citations omitted).

directed at expression, as Scalia's *Smith* jurisprudence requires as a threshold matter, perhaps Scalia could have done so sub silentio. If, in fact, Scalia could fairly have concluded, applying the methodology of his *Smith* jurisprudence, that the New Jersey civil rights law was directed at expression, then his failure to concur separately in order to make that point might be overlooked and his vote harmonized (at least in its result) with his *Smith* jurisprudence. Part III addresses the question whether Scalia could fairly have concluded that the New Jersey civil rights law was directed at expression or, for that matter, at expressive association.

Assuming that theory also fails to harmonize Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence, Part IV considers a final matrix of theories. As fully elaborated, Scalia's *Smith* jurisprudence does not *always* require First Amendment challengers to show that a challenged law was directed at expression (or religion). That approach, formulated in *Smith* and *Barnes*, applies to regulations of *conduct* that result in the incidental restriction of expressive or religious *conduct*. It does not apply to regulations that produce incidental restriction of *actual speech or profession of religious belief*. In addition, there is a category of conduct that Scalia assimilates to actual speech or religious profession and that, as a result, also receives greater protection than Scalia endorsed in *Smith* and *Barnes*. The question addressed in Part IV, then, is whether *Boy Scouts* can be explained with reference to these additional nuances of Scalia's First Amendment jurisprudence. It is this theory that comes closest to harmonizing his vote in *Boy Scouts* with his *Smith* jurisprudence.

II. EXTENDING *SMITH* TO EXPRESSIVE ASSOCIATION

The first theory for harmonizing Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence requires distinguishing between the freedom of association and the freedoms of speech and religion. This theory proposes that Scalia would not automatically extend his *Smith* framework to the association context but would, instead, view association as entitled to greater protection than either speech or religion. Under an alternative formulation, this theory proposes that since *Roberts* endorsed strict scrutiny even in the case of incidental restrictions on expressive association, Scalia might follow *Roberts* not as a matter of his own interpretive philosophy but as a matter of stare decisis. While either theory could harmonize Scalia's *Boy Scouts* vote with his *Smith* jurisprudence, neither is particularly persuasive.

A. A GENERAL THEORY OF THE FIRST AMENDMENT

One way to resolve the apparent inconsistency would be to distinguish freedom of association, which was the nominal basis of decision in *Boy Scouts*, from the freedoms of speech and religion, which were not. Perhaps Scalia's *Smith* jurisprudence, while appropriate for the latter, should not appropriately extend to the former. Professor Doug Kmiec has argued, for example, that the *Smith* jurisprudence "may work for Justice Scalia in matters of free exercise," but he also argues that he "see[s] no compelling reason to transfer [it] to the freedom enjoyed by private association."⁷⁵ Although Scalia has declined to apply heightened scrutiny in cases involving incidental restriction of expressive and religious conduct, one might nevertheless argue that the freedom of association is categorically distinguishable so that a different jurisprudence is more appropriate, one in which a mere showing of incidental restriction is sufficient to trigger heightened scrutiny in that context.

There are, however, serious reasons to doubt that the freedom of association can be so readily distinguished from the freedoms of speech and religion as to support the use of a different and more protective standard in the former case as compared to the latter. First, and most generally, it would seem anomalous to elevate the freedom of association above the freedoms of speech and religion—making association alone a kind of *super-preferred* freedom.⁷⁶ Although Professor Kmiec, for example, has stressed the sensitivity and importance of the freedom of association,⁷⁷ not even he has suggested that it is *more* sensitive or important than the freedoms of speech and religion, even in their conduct manifestations.⁷⁸ Some commentators might go so far, but one ought to be reluctant to attribute such an unconventional ranking to Scalia based solely on his silent acquiescence in the majority opinion in *Boy Scouts*.

Scalia's philosophical commitment to textualism, moreover, provides a positive reason for doubting that, as a general matter, he would prioritize

75. Douglas W. Kmiec, *Professor Douglas W. Kmiec's Response*, 28 PEPP. L. REV. 667, 667 (2001) (responding to Tribe, *supra* note 7). I should make clear, however, that in this passage Professor Kmiec was not explicating Justice Scalia's view of the freedom of association; he was presenting his own view of the proper construction of that right.

76. *Cf.*, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

77. *See* Kmiec, *supra* note 75, at 668.

78. Indeed, far from subordinating speech to association, Professor Kmiec merged the two in the very passage cited. *See id.* Kmiec's own language also belied such a hierarchy with regard to religious freedom, for he seemed rather obviously to disagree with Justice Scalia's *Smith* jurisprudence in the religion context. *See id.* at 667 (inserting that Scalia's view "remains a highly disputed proposition").

freedom of association over freedoms of speech and religion.⁷⁹ Unlike the latter two, freedom of association is enumerated nowhere in the text of the Constitution. Regardless whether it *ought* to be, it simply is not.⁸⁰ Freedom of association is, at best, an implied right, extrapolated from the First Amendment. Indeed, freedom of association was one of the chief penumbral rights to which Justice Douglas adverted in distilling the constitutional right of privacy in *Griswold v. Connecticut*.⁸¹ As a committed textualist, Scalia would presumably view it as anomalous to provide greater judicial protection to a mere penumbra than to the enumerated source of emanations that *form* the penumbra.⁸²

Indeed, as the Court itself has specifically explained, freedom of *expressive* association—the precise version of association nominally at issue in *Boy Scouts*—is not an independent constitutional right but is merely an instrumental means of preserving other First Amendment freedoms. In *Roberts v. United States Jaycees*,⁸³ the majority expressly justified its recognition of the freedom of expressive association as “an indispensable means of preserving other individual liberties” and went on to describe the freedom as an “instrumental” one.⁸⁴ Arguing that freedom of expressive association should be given greater judicial protection than the explicit First Amendment freedoms it serves to invigorate is akin to suggesting that a principal can delegate to an agent power that the principal does not have or that a landowner may sell encumbered property to another free of encumbrances. If Scalia’s *Smith* jurisprudence did not extend to freedom of expressive association, individuals would theoretically have greater freedom to associate for the purpose of engaging in speech or practicing their religion than they would have to actually speak or practice their religion. Any

79. See *infra* Parts IV-A and IV-C for a fuller discussion of this point.

80. Kmiec, *supra* note 75, at 671 (“Somebody will have to tell me when the associational rights bec[a]me enumerated—that is, textual.”).

81. See 381 U.S. 479, 484 (1965) (describing freedom of association as “contained in the penumbra of the First Amendment”).

82. See *id.* at 484 (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). But see *Troxel v. Granville*, 530 U.S. 57, 93 n.2 (2000) (Scalia, J., dissenting) (suggesting that freedom of expressive association is an “enumerated right[]” despite absence of such language from the First Amendment).

83. 468 U.S. 609 (1984).

84. *Id.* at 618. The Court also noted that

[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Id. at 622.

differential in terms of judicial protection, however, seemingly ought to favor the intrinsic freedom (speech or religion), not the instrumental one (expressive association). At the very least, the instrumental justification for recognizing the right suggests it ought to be given, at the very most, the *same* level of protection as the rights it serves and from which it springs.⁸⁵

Perhaps most relevant, Scalia's *Smith* jurisprudence does not seem to contemplate a fragmentation of First Amendment standards. Instead, his writings seem to suppose that what he has developed is a general theory of the First Amendment, if not of constitutional rights more broadly. In *Smith*, he explicitly adverted to prior decisions involving freedom of the press,⁸⁶ decisions which, in his view, supported the proposition that mere incidental restriction of a First Amendment interest did not violate the First Amendment. He also anticipated in *Smith* that his approach in the religion context would extend to the expression context,⁸⁷ and he later cited *Smith* for support when, in fact, he did *extend Smith* to expression in his *Barnes* concurrence.⁸⁸ Beyond the First Amendment, Scalia analogized his rejection of incidental restriction claims to the Court's long-standing rejection of roughly analogous disparate impact claims in equal protection law.⁸⁹ While acknowledging that specific targeting of First Amendment interests triggers heightened scrutiny, Scalia has repeatedly taken the position that applying heightened scrutiny in the case of general laws not specifically directed at First Amendment interests would produce "a constitutional anomaly"⁹⁰—"a private right to ignore generally applicable laws."⁹¹

85. For a further elaboration of this argument, see *infra* Part IV-C.

86. See *Employment Div. v. Smith*, 494 U.S. at 878 (1990) (comparing *Citizen Publ'g. Co. v. United States*, 394 U.S. 131, 139–40 (1969) (rejecting claim that Free Press Clause prohibited application of antitrust laws to newspaper companies), with *Grosjean v. Am. Press*, 297 U.S. 233, 250 (1936) (invalidating tax on newspapers that was shown to be "a deliberate and calculated device . . . to limit the circulation of information").

87. See *id.* at 886 n.3.

88. See *Barnes v. Glen Theatre*, 501 U.S. 560, 579 (1991) (Scalia, J., concurring). Scalia noted here that

[w]e have explicitly adopted such a regime in another First Amendment context: that of free exercise. . . . There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

Id.

89. See *Smith*, 494 U.S. at 886 n.3 (citing *Washington v. Davis*, 426 U.S. 229 (1976) (rejecting disparate impact claims)).

90. *Id.* at 886.

91. *Id.*

In light of Scalia's consistent embrace of this philosophy from religion and speech to press and equal protection, the view that *association* is different and is entitled to greater judicial protection seems implausible. Absent a clearer indication from Scalia, one should presume that his *Smith* jurisprudence applies to freedom of association as well as to the freedoms of speech and religion. To begin with that assumption is not to conclude that *Boy Scouts* was indistinguishable from *Smith* or *Barnes* or that the result should have been the same. But it requires that *Boy Scouts* be analyzed within the same general framework that Scalia has developed in those cases. If the *Smith* jurisprudence represents, as it seems, a general theory of the First Amendment, it ought to extend in principle to freedom of association as well as to other First Amendment freedoms.⁹²

B. THE FORCE OF STARE DECISIS

If freedom of association cannot in a substantive sense be categorically distinguished from other First Amendment freedoms, it might at least be distinguished in the procedural sense that stare decisis has given the strict scrutiny approach of *Roberts* binding force absent a compelling reason to upset settled law. As applied in this particular context, however, the stare decisis justification is rather weak.

This harmonizing theory is not weak because Scalia altogether disregards stare decisis. To the contrary, he has in principle acknowledged its binding force, explaining that even his brand of textualist interpretive theory, as "put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."⁹³ Disregarding settled law would render a proposed interpretive methodology—particularly a novel or historically disfavored one—"so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance."⁹⁴ Nevertheless, there are a number of reasons why stare decisis seems an inadequate explanation for the apparent inconsistency between Scalia's vote in *Boy Scouts* and his *Smith* jurisprudence.

92. See *infra* Parts III-B and IV-C for an application of the *Smith* jurisprudence to expressive association.

93. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–39 (Amy Gutmann ed., Princeton Univ. Press 1997).

94. *Id.* at 139.

As an initial matter, Scalia has demonstrated some doubt about *Roberts* itself. At the time of *Roberts*, he had not yet joined the Court.⁹⁵ But he had done so by the time of two follow-up cases, *Board of Directors of Rotary International v. Rotary Club of Duarte*⁹⁶ and *New York State Club Association, Inc. v. City of New York*,⁹⁷ and in neither of them can one find Scalia providing a whole-hearted endorsement of *Roberts*. In *Rotary*, which applied *Roberts* in a slightly different factual context, Scalia concurred only in the judgment without filing an opinion to explain his motive.⁹⁸ His seeming unwillingness to affirmatively endorse *Roberts* is itself significant. While he did, in contrast, join the relevant portion of the Court's opinion in *New York State Club*, that opinion simply rejected a sweeping facial challenge on the authority of *Roberts* and *Rotary* without any need to consider or apply the details of the *Roberts* doctrine.⁹⁹ The sheer breadth of the facial challenge perhaps allowed Scalia to join the Court's opinion even if he had some misgivings about certain features of *Roberts*.

More to the point, in both *Smith* and *Barnes*, Scalia demonstrated a willingness to directly engage *Sherbert*, *O'Brien*, and other precedents and employ common law reasoning in order to explain that his *Smith* jurisprudence was broadly consistent with the *holdings*, if not all of the reasoning, of the Court's precedents involving religious and expressive conduct.¹⁰⁰ Where the result but not the reasoning in past decisions supported his theory, he disclaimed the reasoning and relied on his *Smith* jurisprudence to justify the result.¹⁰¹ And where neither the result nor the reasoning in past

95. Scalia received his commission as a justice of the Supreme Court on September 25, 1986. See FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, at http://air.fjc.gov/history/home.nsf/judges_frm.

96. 481 U.S. 537 (1987).

97. 487 U.S. 1 (1988).

98. See *Rotary*, 481 U.S. at 550.

99. See *N.Y. State Club Ass'n.*, 487 U.S. at 11–14 (holding that some of the clubs challenging the law in question were indistinguishable from clubs that had challenged laws in *Roberts* and *Rotary* and that, consequently, a facial challenge was inappropriate). Scalia's separate concurrence addressed only an equal protection claim. *Id.* at 20–21.

100. See *Barnes v. Glen Theatre*, 501 U.S. 560, 579 (1991) (“In each of the foregoing cases, we explicitly found that suppressing communication was the object of the regulation of conduct.”); *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *Reynolds v. United States*, 98 U.S. 145 (1879)); *id.* at 883 (citing decision in *Sherbert v. Verner*, 374 U.S. 398 (1963) while noting that “[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.”).

101. See *Barnes*, 501 U.S. at 578 (“All our holdings (though admittedly not some of our discussion) support the conclusion” that conformed to the dictates of his theory); *id.* at 577 (“[W]here suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons[,] we have allowed the regulation to stand.” (citing, *inter alia*, *United States v.*

decisions supported his theory, he distinguished the decisions, sometimes employing novel or dubious reasoning.¹⁰² In short, Scalia has been quite willing to move First Amendment law toward his *Smith* jurisprudence, notwithstanding the principle of stare decisis.

The associational precedents on which the Court based its decision in *Roberts* are readily subject to a similar reformulation more in line with Scalia's *Smith* jurisprudence than the broad strict scrutiny approach actually articulated in *Roberts*. For example, in one of the foundational cases, *NAACP v. Alabama ex rel. Patterson*,¹⁰³ the Court held that Alabama could not compel the National Association for the Advancement of Colored People (NAACP) to disclose the identities of its members in that state. A state court had held the NAACP in contempt for refusing to obey a discovery order requiring the disclosures in an action in which the state sought to oust the NAACP from the jurisdiction for having failed to register as a foreign corporation doing business there. The Court applied heightened scrutiny¹⁰⁴ and invalidated the orders. Although the Court's explicit reasoning focused on the *effect* of the disclosures on the NAACP's public advocacy,¹⁰⁵ the

O'Brien, 391 U.S. 367, 377 (1968)); *Smith*, 494 U.S. at 878–79. In *Smith*, Scalia summarized previous free exercise decisions as follows:

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 [since 1879] 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).'

Smith, 494 U.S. at 878–79 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). See also *id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied." (citing *Lee*, 455 U.S. 252, and *Gillette v. United States*, 401 U.S. 437 (1971))); *id.* at 884–85 ("Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws . . . , we have never applied the test to invalidate one.").

102. See *Smith*, 494 U.S. at 881–82 (distinguishing some of the most significant free exercise precedents as having "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections"); *id.* at 883–85 (limiting the *Sherbert* test to instances "where the State has in place a system of individual exemptions, in which it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

103. 357 U.S. 449 (1958).

104. See *id.* at 464–66.

105. See *id.* at 462–63 ("[C]ompelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."). See generally *id.* at 460–63 (discussing precedents). The decision might also be explained on the ground that the state lacked any significant justification for demanding discovery of the information—or for the lower court to have ordered it. See *id.* at 464 ("[W]e are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of [the states' objectives]."). But see *id.* at 465 ("[W]hatever

state's lawsuit,¹⁰⁶ its discovery request, and the state judiciary's response to both were transparently directed at squelching civil rights activism. Indeed, in refusing to review the lower court's contempt order, the state supreme court invoked a previously unknown procedural bar¹⁰⁷—one that it had not applied to an analogous appeal brought a few years earlier by the Ku Klux Klan.¹⁰⁸ *Patterson* need not be read as the enforcement of a general conduct regulation that happened to produce an incidental burden on associational freedom. To do so disregards the reality of what was going on in Alabama in the 1950s.¹⁰⁹

*Shelton v. Tucker*¹¹⁰ and other associational cases from the Civil Rights Era, though involving somewhat less blatant targeting of expressive association, may be read similarly. In *Shelton*, for instance, the Court invalidated a state statute requiring public school teachers to disclose all organizations to which they had belonged or contributed money over the previous five years. Although the Court's reasoning did not rest on the proposition that the state was targeting expressive association,¹¹¹ the majority cited evidence in the record suggesting that such targeting, as a matter of administrative implementation, was almost inevitable.¹¹² Moreover, such targeting could readily be inferred¹¹³ from the disjunction between the statute's purported goal—ensuring teacher competence and fitness—and the mandatory disclosure of “every single organization with which [a teacher]

interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.”).

The Court's explicit reliance on the *effect* of the compulsory disclosure on the NAACP may be undercut, moreover, by its debatable attempt to distinguish its own prior decision upholding a New York law compelling the Ku Klux Klan to disclose its membership rosters. *See id.* at 465–66 (purporting to distinguish *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), on the basis of the Klan's potential for violence and its unwillingness to comply with any aspect of the law in question).

106. The timing of the state's action itself was revealing. The lawsuit was filed two years after *Brown v. Board of Education*, 347 U.S. 483 (1954), at the height of the civil rights movement in Alabama, although the NAACP had been operating in the state for nearly forty years without even having registered as a foreign corporation doing business there.

107. *See Alabama ex rel. Patterson*, 357 U.S. at 456 (“We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment.”).

108. *See id.* at 456–57 (discussing *Ex parte Morris*, 42 So.2d 17 (1949)).

109. *See also Healy v. James*, 408 U.S. 169, 169–70 (1972) (invalidating university's refusal to recognize local chapter of national student organization opposed to Vietnam War).

110. 364 U.S. 479 (1960).

111. *See id.*, 364 U.S. at 487–90.

112. *See id.* at 364 U.S. 486 nn.6–7 (observing that the state attorney general had opined that public disclosure of the lists was a matter within the administrative discretion of local school boards and observing that at least one “citizens' council” planned to seek public disclosure of the lists for the purpose of seeking the discharge of teachers affiliated with unpopular groups).

113. *See infra* Part III-A.

has been associated over a five-year period.”¹¹⁴ As the Court itself noted, “[t]he unlimited and indiscriminate sweep of the statute . . . goes far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers.”¹¹⁵ Three years later in *NAACP v. Button*,¹¹⁶ Justice Douglas, who provided the requisite fifth vote for the decision, went beyond the plurality’s mere focus on incidental restriction of associational rights¹¹⁷ and based his concurring vote on the ground that the challenged statute “reflects a legislative *purpose* to penalize the NAACP because it promotes desegregation of the races.”¹¹⁸ Under Scalia’s *Smith* jurisprudence, one could reach the same result as the Court in each of these cases.¹¹⁹ Other precedents can also be harmonized with Scalia’s *Smith* jurisprudence because they involved incidental restriction of actual speech as opposed to mere expressive conduct.¹²⁰

Finally, the force of the stare decisis argument is specifically weakened in *Boy Scouts* by the majority’s own reconstruction of *Roberts*. After noting that in *Roberts* and its progeny the Court had applied strict scrutiny and found that the government had a compelling interest to support the antidiscrimination laws at issue in those cases,¹²¹ the *Boy Scouts* majority elevated a different portion of the *Roberts* opinion and derived a different approach—an ambiguous balancing test—from that language.¹²² It would

114. *Shelton*, 364 U.S. at 487–88.

115. *Id.* at 490. *See also id.* at 488 (“Many such relationships could have no possible bearing upon the teacher’s occupational competence or fitness.”).

116. 371 U.S. 415 (1963).

117. *See id.* at 431 (“Our concern is with the *impact* of enforcement of [the statute] upon First Amendment freedoms.” (emphasis added)).

118. *Id.* at 445 (Douglas, J., concurring) (emphasis added).

119. In other associational cases cited by *Roberts*, challenged laws have clearly singled out forms of expressive association—such as gathering as a political party—and sometimes have even done so, in part at least, to alter the influence of various factions within the group. *See, e.g.*, *Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87 (1982) (invalidating as applied state statute requiring public disclosure of members of all political committees); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (invalidating attempt by state to force political party to qualify delegates elected in state-mandated open primary in violation of party rules); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (invalidating enforcement of state statute requiring that delegates to political party conventions be elected). Scalia’s *Smith* jurisprudence could, likewise, reach each of these fact scenarios.

120. *See infra* Part IV. This theory explains such precedents as *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

121. *See Boy Scouts of Am. v. Dale*, 530 U.S. at 657 (“We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations.”).

122. *See id.* at 658–59. The Court noted that in the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn.*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any ‘serious burden’ on the organization’s rights of

have been difficult to join the majority opinion in *Boy Scouts* on a stare decisis theory, since the majority opinion itself reconfigured the *Roberts* line of cases and the expressive association doctrine along with it. Although the *Hurley* decision, which Scalia joined, might provide an additional basis for a stare decisis justification, that decision is distinguishable within his own *Smith* jurisprudence—but that is a matter to be taken up in Part IV-B.

For these reasons, stare decisis seems a less than persuasive way to harmonize Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence. He has formulated what he has seemed to regard as a general theory of the First Amendment. In doing so, he has not been reluctant to reexamine speech and religion precedents. Little suggests he should have had any principled reluctance to do exactly the same thing in *Boy Scouts* with respect to expressive association precedents.

III. IMPERMISSIBLE TARGETING IN *BOY SCOUTS*

A second way to resolve the apparent inconsistency between Scalia's vote in *Boy Scouts* and his *Smith* jurisprudence would be to apply that jurisprudence to the facts of *Boy Scouts* and find that New Jersey's law, in fact, was specifically directed at a First Amendment interest. Such an approach would factually distinguish *Boy Scouts* from *Smith* and *Barnes* without creating a jurisprudential inconsistency. Although the majority in *Boy Scouts* did not analyze the case this way, showing that it could have done so would at least reframe any criticism of Scalia. One could then object only to his failure to concur in the judgment on *Smith* grounds rather than to his failure to dissent and change the outcome of the case. The present inquiry is whether within the methodology employed by Scalia in his *Smith* jurisprudence, New Jersey's civil rights law could be considered a law specifically targeting a First Amendment interest. The answer is almost certainly no.

A. THE *SMITH* METHODOLOGY

To establish that a conduct regulation presumptively violates the First Amendment in Scalia's *Smith* jurisprudence, challengers must demonstrate a degree of causation. Scalia has posed what he regards as the relevant inquiry in a variety of forms. He has asked whether suppression of First

expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.
Id.

Amendment activity was the “purpose”¹²³ or “object”¹²⁴ of a challenged regulation; whether the regulation “singles out,”¹²⁵ “targets,”¹²⁶ or is “specifically directed at”¹²⁷ First Amendment activity; or whether the government has regulated conduct “precisely because of” its First Amendment aspects.¹²⁸ However phrased, what Scalia has demanded before recognizing a First Amendment violation in his *Smith* jurisprudence is a showing that a conduct regulation was not imposed “irrespective of”¹²⁹ the First Amendment aspects of the regulated conduct but that the regulation in fact targets the conduct because of its First Amendment aspects. What he requires, in other words, is kind of causal link between the imposition of a conduct regulation and the First Amendment aspects of the regulated conduct. *Tar-*

123. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578 (1991) (Scalia, J., concurring) (“whether the purpose of the law is to suppress communication.” (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622–23 (D.C. Cir. 1983))).

124. *Id.* at 577 (Scalia, J., concurring) (“[T]hat suppressing communication was the object of the regulation of conduct. Where that has not been the case, however—where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons—we have allowed the regulation to stand.”); *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (“[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision.”).

125. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in judgment) (“singles out a religious practice for special burdens.”).

126. *Barnes*, 501 U.S. at 574 (Scalia, J., concurring). In *Barnes*, Scalia noted that [w]ere it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct.

Id. (citations omitted). See also *Lukumi Bablu Aye*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in judgment) (“[T]he defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.”).

127. *Smith*, 494 U.S. at 878 (regulation “not specifically directed at their religious practice”); *Barnes*, 501 U.S. at 572 (Scalia, J., concurring) (“a general law regulating conduct and not specifically directed at expression”).

128. *Barnes*, 501 U.S. at 577 (suggesting rule of per se invalidity). See also *City of Erie v. Pap’s A.M.*, 529 U.S. 227, 310 (2000) (Scalia, J., concurring) (“When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only ‘[w]here the government prohibits conduct precisely because of its communicative attributes.’ (quoting *Barnes*, 501 U.S., at 577)); *id.* at 307 (“by its terms prohibits not merely nude dancing; but the act—irrespective of whether it is engaged in for expressive purposes—of going nude in public.”); *Lukumi Babalu Aye*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in judgment) (“the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits)” (citations omitted)); *Barnes*, 501 U.S. at 576 n.3 (Scalia, J., concurring) (“A law is ‘general’ for the present purposes if it regulates conduct without regard to whether that conduct is expressive.”).

129. *Barnes*, 501 U.S. at 595.

geting is a useful metaphor that Scalia has employed repeatedly in describing the requisite causal link.

Although the Court asks a similar-sounding question in equal protection law,¹³⁰ Scalia's methodology for discerning unconstitutional targeting of First Amendment interests in *Smith* is, despite a superficial resemblance,¹³¹ significantly different from the quest in equal protection law to identify intentional discrimination. In his separate opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹³² which contains his most specific discussion of the causation requirement, Scalia made clear that the inquiry does *not* focus on the subjective motive of the lawmakers who enacted a challenged regulation or of the administrators who enforced it, as is the case in equal protection law. Rather, the inquiry focuses on the regulation itself in order to determine whether it effectively targets First Amendment interests, whatever lawmakers or administrators may have intended.¹³³ Refusing to consider legislative history, including fairly damning statements by citizens, legislators, and other public officials about the law under review in *Lukumi Babalu Aye*,¹³⁴ Scalia adverted to his previously articulated view on this issue and insisted that the proper judicial focus should remain on "the object of the laws at issue" instead of "the subjective motivation of the lawmakers."¹³⁵

This rejection of subjective intent as evidence of impermissible targeting greatly limits the ability of challengers to demonstrate that a conduct regulation does in fact impermissibly target their First Amendment interests. As previously discussed,¹³⁶ Scalia's opinions in *Smith* and *Barnes* reject the notion that heightened scrutiny applies merely because a conduct

130. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (requiring that a challenged law have been enacted "at least in part 'because of,' not merely 'in spite of,'" its disparate impact on a protected class).

131. In describing his inquiry into formal neutrality Scalia himself has drawn a rough theoretical analogy to equal protection law.

132. 508 U.S. 520 (1993) (Scalia, J., concurring in part and concurring in the judgment).

133. See *id.* at 558–59 (explaining that a law effectively targeting First Amendment interests would violate the First Amendment in his view even if the targeting had been unintentional and that a law lacking such effective targeting would not violate the First Amendment even if the government had intended, but ineptly failed to target First Amendment interests).

134. In determining that the law under review violated the First Amendment, Kennedy specifically analogized the inquiry to equal protection law and considered legislative history as evidence of subjective intent, which he deemed relevant. See *id.* at 540–42. Scalia refused to join that portion of Kennedy's opinion of the Court. *Id.* at 558.

135. *Id.* at 558 (citing *Edwards v. Aguillard*, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting) (stating that the Court is not generally "in the business of invalidating laws by reason of the evil motives of their authors").

136. See *supra* Part I-A.

regulation produces an incidental restriction of First Amendment activity. Instead, challengers must show that the government has targeted conduct because of its First Amendment aspect. By rejecting proof of subjective intent as a method of establishing that targeting, however, Scalia has greatly restricted the methodological options for successfully challenging a conduct regulation that interferes with First Amendment activity.

Instead, Scalia identified two general ways that challengers may succeed in making the requisite showing of impermissible targeting: they must show that a challenged conduct regulation discriminates against First Amendment activities either (1) on its face or (2) in its operation. In *Lukumi Babalu Aye*, Scalia explained that laws impermissibly targeting First Amendment interests are those which “by their terms impose disabilities on the basis of”¹³⁷ a First Amendment interest or those which, “through their design, construction, or enforcement,” target a First Amendment activity “for discriminatory treatment.”¹³⁸ It is through either of these rather limited methods that challengers may establish impermissible targeting of First Amendment interests under Scalia’s *Smith* jurisprudence.

The first method is fairly straightforward. It simply requires challengers to show facial discrimination against First Amendment interests, which although rare, is not conceptually complicated. The question is whether, on its face, a challenged regulation classifies in some way on the basis of expression or religion. For Scalia, the archetypical showing was made in *McDaniel v. Paty*,¹³⁹ where the Court invalidated a state law barring any “Minister of the Gospel, or priest of any denomination whatever”¹⁴⁰ from serving as a delegate to a state constitutional convention. On its face, this state law classified individuals on the basis of religious function and was unconstitutional. As Scalia has explained, where a First Amendment aspect is a “necessary element”¹⁴¹ in identifying the class of conduct subject to regulation, that regulation targets First Amendment interests.

Although showing facial discrimination of this kind is often impossible, Scalia has demonstrated some leniency in recognizing instances of it. A challenged law need not contain an explicit reference to expression or religion, for example, so long as it targets a category of conduct that may

137. Scalia refers to this problem as “the defect of lack of neutrality.” *Lukumi Babalu Aye*, 508 U.S. at 557.

138. *Id.* at 557 (emphasis added). Scalia refers to this problem as “the defect of lack of general applicability.” *Id.*

139. 435 U.S. 618 (1978).

140. *Id.* at 621 n.1 (internal quotation marks omitted).

141. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 573 (1991) (Scalia, J., concurring).

be called “conventionally expressive”¹⁴² or, by extension, conventionally religious.¹⁴³ Examples would include laws targeting such conduct as flag-burning¹⁴⁴ or “bowing down before a golden calf.”¹⁴⁵ Because that kind of conduct “is normally engaged in for the purpose of communicating an idea”¹⁴⁶ or for a religious purpose, Scalia has explained that one may fairly infer that facial discrimination against such conduct, even absent overt reference to expression or religion, is a form of impermissible targeting of First Amendment interests.

Less straightforward is the second method for establishing impermissible targeting: showing that a law, through its “design, construction, or enforcement,” targets First Amendment activities for “discriminatory treatment.” Since this method involves laws that are “neutral in their terms,” it necessarily focuses on some type of covert or non-facial targeting of First Amendment interests. Given Scalia’s rejection of both incidental restriction and subjective intent as grounds for viable claims in his *Smith* jurisprudence, his recognition of some kind of non-facial targeting is a bit obscure. How is it possible to successfully challenge a facially nondiscriminatory law as discriminatory if a challenger must prove discriminatory targeting without proof of subjective motive? In light of Scalia’s stated commitment to textualism, the answer seems to be an approach that may be usefully, though roughly, analogized to the idea of a latent ambiguity in a contract. Just as a latent ambiguity does not appear on the face of a contract but “appears by reason of some collateral matter,”¹⁴⁷ so too Scalia seemingly contemplates a kind of latent discrimination that appears not on the face of a law but from the law’s actual operation in light of real-world facts.

In considering actual operation, Scalia has indicated that the appropriate focus is on the design, construction, or enforcement of a challenged law, and case law casts some light on what he may have meant by those considerations. *Lukumi Babalu Aye*, the very case in which Scalia made the observation, would seem to provide some evidence of what he meant by

142. *Id.* at 577 n.4 (internal quotation marks omitted).

143. *See* *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (opining that the government would violate the Free Exercise Clause “if it sought to ban such acts or abstentions . . . only because of the religious belief that they display”).

144. *See* *Texas v. Johnson*, 491 U.S. 397, 402–06 (1989).

145. *Smith*, 494 U.S. at 878.

146. *Barnes*, 501 U.S. at 577 n.4.

147. 17A C.J.S. CONTRACTS § 305 (1936). *See also, e.g.*, *C & A Constr. v. Benning Constr.*, 509 S.W.2d 302, 303 (Ark. 1974) (“[A] ‘latent ambiguity’ arises from undisclosed facts or uncertainties of the written instrument.”).

latent discrimination that becomes apparent from examining a law's "design." Portions of the majority opinion that Scalia joined went beyond both the subjective inquiry that Scalia has rejected and also a textual inquiry that he has embraced.¹⁴⁸ Those additional portions examined the operation of the challenged law in context.

This contextual examination included two main investigations. First, the Court compared the class of conduct prohibited by the challenged law with the larger class of similar conduct that the challenged law left unregulated. The law at issue—a set of city ordinances—prohibited certain acts of ritual animal sacrifice. In striking down the ordinances as violative of the First Amendment, the Court observed that because they applied only to ritualized animal killings, that were unrelated to food production, and that were "unnecessary," virtually all animal slaughter escaped the prohibition with perhaps the lone exception of ritual sacrifices conducted by adherents to the Santería faith.¹⁴⁹ This "careful[] drafting"¹⁵⁰ produced what was in effect a "religious gerrymander"¹⁵¹ and indicated that, whatever the motive of the enacting body, the ordinances effectively singled out the practice of Santería for discriminatory treatment. That discrimination might not be apparent, however, unless one considered what types of extant slaughtering it prohibited and what types it left unregulated. Only by looking at the regulatory context could one identify a gerrymander effectively targeting Santería.

Second, the Court compared the prohibition with the government interests asserted to justify it and found a substantial incongruence. The city's asserted interests in neither protecting public health nor preventing animal cruelty required the ordinances' flat prohibition of *all* Santería sacrifices and, as a practical matter, *only* Santería sacrifices. The prohibition was substantially underinclusive and overinclusive. The Court wondered, for example, why the public-health interest would not be equally, if not better, served by generally regulating the disposal of biohazardous waste.

148. The Court began by noting suspicious references in the text of the ordinances, which literally prohibited only "ritual" animal "sacrifice" and identified "certain religions" and acts of "religious groups" as the source of the statutory evil. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. at 534–35. Rather than find facial discrimination based on these references, however, the Court extended its analysis to the operation of the ordinances. *Id.* at 535.

149. *Id.* at 536–37.

150. *Id.* at 536.

151. *Id.* at 535 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 644, 696 (1970) (Harlan, J., concurring.)).

The imprecise fit suggested that as a matter of *design* (if not subjective motive), the ordinances effectively targeted Santería.¹⁵²

This second investigation into the means-ends nexus might seem at odds with Scalia's express refusal to consider subjective intent, but it can also be read consistently with that refusal. What Justice Kennedy really seemed to be saying in the majority opinion was that the substantial incongruence between the prohibition and the asserted governmental interests indicated that the asserted interests were mere pretexts concealing the government's intentional targeting of Santería.¹⁵³ The identification of pretexts, however, cannot explain Scalia's tacit endorsement of the means-ends analysis, given his refusal to consider subjective intent. Rather, in his case, the means-ends analysis might be understood as helping to resolve a potential problem with the first contextual investigation, the comparison of the prohibited and unregulated classes of conduct. In order to find that the prohibited conduct has been singled out for discriminatory treatment, one must first be able to identify a class of unregulated conduct that is *similarly situated* to the prohibited class of conduct. Examining the government's asserted justifications for the prohibition can help to identify unregulated classes of conduct that present the same or a similar evil, and the kind of means-ends analysis in *Lukumi Babalu Aye* can help to fortify the conclusion that in fact there are classes of other, similarly situated conduct that a challenged law has left unregulated. In that way, the means-ends analysis can be understood not merely as a search for pretext and illicit legislative intent but also (or instead) as a component of the first, more objective inquiry into a challenged law's selective focus.

The selective-focus inquiry of *Lukumi Babalu Aye* also tracks the analysis of a precedent that Scalia identified as outlining the proper approach to latent discrimination against First Amendment interests. That

152. *Id.* at 538–39, 543–46. This feature of Scalia's methodology provides the basis for finding discriminatory targeting of expressive association in a case like *Shelton v. Tucker*. See *supra* Part II-B.

153. See *Lukumi Babalu Aye*, 508 U.S. at 538 (“It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.” (internal quotation marks and citation omitted)); *id.* at 539 (suggesting the government may not have had a “real concern” in preventing animal cruelty). Compare *Romer v. Evans*, 517 U.S. 620 (1996), in which Justice Kennedy stated:

The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id. at 635.

precedent was *Fowler v. Rhode Island*,¹⁵⁴ and it seemingly provides some insight into what Scalia may have meant by his reference to latent discrimination resulting from a challenged law's *construction*. In *Fowler*, the Court invalidated a city ordinance forbidding any person to "address any political or religious meeting in any public park."¹⁵⁵ Although the ordinance had been construed as inapplicable to "church services,"¹⁵⁶ that exception had not be construed to apply to meetings of Jehovah's Witnesses. Avoiding a broad resolution of the question whether a city may, in later parlance, convert a public park into a limited public forum so as to exclude expression,¹⁵⁷ the Court invalidated the ordinance on the narrower ground that, "as construed and applied," it discriminated against Jehovah's Witnesses by classifying their meetings as prohibited addresses while classifying more traditional sermons as exempted "church services."¹⁵⁸ Although the Court did not engage in a means-ends analysis, it did make some effort to explain that the meetings of Jehovah's Witnesses, though somewhat different from traditional worship services of mainline sects, had to be regarded as similarly situated to those services.¹⁵⁹ *Fowler*, then, resembled the approach of *Lukumi Babalu Aye* to the issue of latent discrimination, but the discrimination emerged from considering the construction (rather than the design) of the law in light of the speakers upon whom it operated and upon whom it did not.

Those cases, directly linked to Scalia's own opinions, suggest that his reference to latent discrimination resulting from a challenged law's *enforcement* should be read similarly. The notion of selective or discriminatory enforcement at first blush seems to raise the very question of subjec-

154. 345 U.S. 67 (1953).

155. *Id.* at 67 (citation omitted).

156. *Id.* at 69.

157. See *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) ("[T]he legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.").

158. *Fowler*, 345 U.S. at 69-70. The Court noted that

[a] religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id.

159. *Id.* The Court found that

[a]ppellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. But . . . it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.

Id. (citations omitted).

tive intent that Scalia has refused to ask. In *Yick Wo v. Hopkins*,¹⁶⁰ in which the Court found selective enforcement to violate equal protection even without direct proof of discriminatory intent, the Court used stark statistical evidence to support an *inference* of discriminatory intent.¹⁶¹ In similar-sounding language, Scalia has acknowledged that latent discrimination may be found in his *Smith* jurisprudence from the fact that of all conduct proscribed by a challenged law, the government has “*in practice*” targeted only that prohibited conduct having a First Amendment aspect while “turning a blind eye” to equally prohibited conduct that lacked such an aspect.¹⁶² Where that is the case, he has observed, “it might be said that what posed as a regulation of conduct in general was in reality a regulation of only” First Amendment activity.¹⁶³

If Scalia meant what he said about disregarding subjective intent, however, his search for discriminatory enforcement should take a more objective form, as in the *Lukumi Babalu Aye* and *Fowler* inquiries, into the treatment of similarly situated classes of conduct. It may be that his analysis would not differ from that in *Yick Wo*, but the stark statistical pattern would support not an inference about the subjective intent of enforcement authorities. Rather, the stark pattern of effective discrimination itself, resulting perhaps from even unintentional enforcement decisions, would establish impermissible targeting of First Amendment interests. On one hand, that different underlying theory of the evidence might allow for a standard more indulgent of inferences than *Yick Wo* in that the statistical pattern might not have to be quite so stark since it is not being used to support an inference about subjective intent. On the other hand, the different underlying theory would presumably render irrelevant much of the “process” evidence that the Court acknowledged in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁶⁴ and may be used to establish covert *intentional* discrimination in equal protection law, evidence that seems geared toward unmasking pretextual decisionmaking.¹⁶⁵

160. 118 U.S. 356 (1886).

161. *Id.* at 374 (“No reason for [the stark statistical distinction] is shown, and the conclusion cannot be resisted, that no reason for it exists *except hostility to the race and nationality to which the petitioners belong . . .*”) (emphasis added).

162. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574 (1991).

163. *Id.*

164. 429 U.S. 252 (1977).

165. There, the Court called for “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* at 266. It explained not only that evidence of adverse impact on a protected group, while rarely determinative in itself, *id.* (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare.”), was probative and might “provide an impor-

At any rate, it is through these methods that Scalia has envisioned challengers establishing the kind of impermissible targeting of First Amendment conduct that he requires in order to trigger heightened scrutiny. The challengers must establish the causal link—that a challenged law interfering with religion, for instance, “singles out a religious practice for special burdens.”¹⁶⁶ Without establishing that causal link, where a general law “regulates conduct without regard to whether that conduct is expressive”¹⁶⁷ or religious, Scalia’s *Smith* jurisprudence condones no First Amendment scrutiny at all.

B. APPLYING THE METHODOLOGY TO *BOY SCOUTS*

With an understanding of Justice Scalia’s methodology for discerning impermissible targeting, one may now apply that methodology to the regulation challenged in *Boy Scouts*. In relevant part, the New Jersey public accommodation law at issue provided that “[a]ll persons shall have the opportunity . . . to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . affectional or sexual orientation . . . , subject only to conditions and limitations applicable alike to all persons.”¹⁶⁸ The question is whether this conduct regulation could fairly be said to target any First Amendment interest. In answering the question it is helpful to consider interests in expression and association, including expressive association, separately.

1. Expression

The *Boy Scouts* opinion turned on the majority’s determination that the application of New Jersey’s public accommodation law to the Boy Scouts would “significantly affect [the organization’s] expression.”¹⁶⁹ Whatever one may think of that determination on the merits, concluding

tant starting point.” *Id.* But the Court also endorsed “process” factors that may be relevant, such as the “historical background” of the challenged action, *see id.* at 267, and the “specific sequence of events leading up to the challenged decision.” *Id.* Further, the Court endorsed the use of legislative history, including “contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268. The Court even went so far as to suggest that “[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action.” *Id.* Scalia clearly would not rely on legislative history, and since the “process” evidence also seems uniquely focused on ferreting out discriminatory subjective intent, that evidence, too, would seemingly be irrelevant in Scalia’s *Smith* jurisprudence.

166. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993).

167. *Barnes*, 501 U.S. at 575–76 n.3.

168. N.J. STAT. ANN. § 10:5-4 (West 2001).

169. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (emphasis added).

that a law would *affect* a First Amendment interest is a far cry from concluding that a law has *targeted* that interest. Although *Roberts* identified that distinction as relevant, nowhere did the majority opinion in *Boy Scouts* expressly consider, let alone conclude, that the challenged law singled out expression for discriminatory treatment.¹⁷⁰

Although that question is central in Scalia's *Smith* jurisprudence, one might nevertheless overlook Scalia's acquiescence in the *Boy Scouts* opinion if, under Scalia's methodology, New Jersey's public accommodation law could be said to have targeted expression. At least one could then say that Scalia's vote to reverse the New Jersey Supreme Court's decision was consistent with his *Smith* jurisprudence, even if the express reasoning of the majority opinion was not. So a crucial inquiry is whether New Jersey's public-accommodation law targeted expression—either on its face or in its design, construction, or enforcement.

Such a proposition would be difficult to maintain, particularly under Scalia's *Smith* methodology. On its face, the public-accommodation law targeted discriminatory denials of access to "all the accommodations, advantages, facilities, and privileges of any place of public accommodation."¹⁷¹ Nothing in the text of this measure limited its application to discriminatory conduct that is expressive. Nor, put another way, did the language in any way make proof of an expressive aspect of the discriminatory conduct an element of the statutory offense. The law enacted a flat prohibition on discriminatory denials of access to public accommodations irrespective of the expressive motive of the discriminator.

170. The majority opinion did close with the observation 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." *Id.* at 661 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995)) (emphasis added). Although that language might at first blush be read to imply that the Court believed New Jersey was engaged in such an expression-suppressing endeavor, the broader context demonstrates otherwise. Such a reading would contradict the Court's implication that the public-accommodations law rested on legitimate (if unidentified) state interests, see *Boy Scouts*, 530 U.S. at 659, and would be quite strange given the complete absence of any discussion of the point or citation of supporting evidence anywhere in the majority opinion. Instead, the closing comment appears to have been aimed at Justice Stevens, for the quotation concluded a passage of the majority opinion that opened by observing that Stevens' dissenting opinion "makes much of its observation that the public perception of homosexuality in this country has changed." *Id.* at 660. The main point of the passage in the majority opinion was to disclaim that the Court had (or should have) been "guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong." *Id.* at 661. See *id.* at 699–700 (Stevens, J., dissenting) (noting decline in prevalence of antigay prejudices). Indeed, the exchange also prompted a separate dissenting opinion clarifying the import of Justice Stevens' observation. See *id.* at 700–02 (Souter, J., dissenting).

171. N.J. STAT. ANN. § 10:5-4 (West 2001).

Nor could one credibly maintain that the public accommodation law actually operated to target only expressive discrimination through the law's design, construction, or enforcement. First, it did not exhibit the design defects apparent in the animal-sacrifice ordinances in *Lukumi Babalu Aye*. Although the public-accommodation law, like the animal sacrifice ordinances, exempted some discriminatory conduct from its prohibition, the exemptions from the public accommodation law would not likely produce the same kind of First Amendment gerrymander that the Court found in *Lukumi Babalu Aye*. The public-accommodation law in *Boy Scouts* exempted "distinctly private" clubs, church-run schools, and entities providing services *in loco parentis*.¹⁷² Unlike exemptions in *Lukumi Babalu Aye*, which had effectively exempted most secular animal slaughter as well as religiously motivated animal sacrifices by followers of faiths other than Santería, the exemptions contained in New Jersey's public accommodation law do not seem to have an analogous effect of exempting most of the nonexpressive discrimination from its coverage and creating a virtual expressive gerrymander. In fact, quite the opposite seems true. By exempting private clubs, church-run schools, and entities providing services *in loco parentis*, those statutory exemptions arguably attempted to *avoid* regulating varieties of discrimination that were far more likely to contain expressive aspects than the discrimination in purely commercial endeavors that remained fully subject to the prohibition.¹⁷³

Second, nothing in the New Jersey Supreme Court's construction of the public-accommodation law narrowed its scope in such a way as to effectively single out expressive discrimination for disfavored treatment. The court interpreted the public accommodation law as requiring three ba-

172. *See id.* § 10:5-5(l).

173. *Id.* The statute states:

"A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Id.

sic inquiries: (1) whether a defendant excluded an individual on the basis of a protected trait, (2) whether the defendant was a public accommodation, and (3) whether the defendant came within any of the statutory exemptions. The first of these elements is common to most civil rights statutes. The third, as noted above, created no expressive gerrymander. And the second, as construed by the court, rested on such expression-neutral considerations as the defendant's degree of selectivity of members or openness to the public,¹⁷⁴ the nature of its relationships with the government and other public accommodations,¹⁷⁵ and its similarity to "recognized and enumerated places of public accommodation."¹⁷⁶

Since there was no suggestion that New Jersey enforced the public accommodation law against only expressive discrimination, the problem with attempting to discern impermissible targeting in *Boy Scouts* was that New Jersey's public-accommodation law applied generally to all sorts of endeavors in many scenarios that would have no significant effect on anyone's expressive interests. Even in the case of sexual orientation discrimination, the law would apply to nonexpressive discrimination against lesbians or gay men, including nonexpressive discrimination by the Boy Scouts, based on erroneous stereotypes, such as the assumption that an openly gay man is HIV-positive or a child molester,¹⁷⁷ or even based on

174. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1210–11 (N.J. 1999).

175. *Id.*

176. *Id.* at 1213.

177. Similarly nonexpressive but resting on stereotyping would be discrimination against a gay scout leader based on a fear or assumption that he will sexually abuse or "convert" his charges. This possible basis for the Boy Scouts' decisions in cases involving gay men should not be readily discounted. Although counsel for the Boy Scouts informed the Court in oral argument that fear of sexual abuse was neither "alleged" against Dale nor "the basis of policy in any way," Transcript of Oral Argument at 10, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), there are reasons to question the complete veracity of that representation. For instance, an administrative agency found that the Boy Scouts'

discriminatory employment policy concerning sexual orientation appears to be derived, at least in part, from the false myths that Professional Scouters who are homosexual will influence young men to change their sexual orientation and will pose a predatory threat to molest young boys. Thus, the *Scoutmaster's Handbook* makes reference to practicing homosexuals when it discusses predatory sexual conduct.

Richardson v. Chicago Area Council of Boy Scouts of Am., No. 92-E-80 at ¶ 67 (Chicago Comm'n Hum. Rels. Feb. 21, 1996), http://www.bsa-discrimination.org/Gays-Top/Richardson-Top/Richardson_Final_Ruling.htm (visited Mar. 21, 2003). See also Respondent's Brief at 36, *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 147 Cal. App. 3d 712 (1983) (Civ. No. 66755) (arguing that if the Boy Scouts could not exclude openly gay scout leaders, "[s]couting activities would no longer be important interludes in which a boy can turn his undivided attention to scouting crafts and outdoor activities without worrying that some person with a sexual interest in him may be watching."). At the very least, the Boy Scouts has exploited the stereotype in litigation. See, e.g., *Petition for a Writ of Certiorari* at 18–19, *Boy Scouts* (No. 99-699) ("Boy Scout Troops . . . involve physical activity on group hikes and campouts *far from the public gaze.*") (emphasis added); Respondent's Brief at 34,

unmitigated, nonexpressive feelings of disgust.¹⁷⁸ While Scalia's *Smith* methodology requires a showing of effective targeting or singling out of expression, New Jersey's public accommodation law created no such expressive gerrymander. Indeed, the Boy Scouts' objection was not that the organization had been *singled out* for disfavored treatment to which other endeavors were not generally subjected. Rather, the objection was that the law treated the organization like other enterprises and failed to specially exempt it. Such a demand for preferential treatment, however, is the opposite of what Scalia regards as effective targeting of expression. A constitutional rule requiring special exemption from generally applicable laws is precisely what Scalia repudiated in both *Smith* and *Barnes*.¹⁷⁹

Curran (Civ. No. 66755) (noting, redundantly and gratuitously, that scout leaders accompany scouts on "their *overnight* camping trips") (emphasis added). In particular, the Boy Scouts has included irrelevant, gratuitous, unexplained, and incendiary citations to *Boy Scouts of Am. v. Teal*, 374 F. Supp. 1276 (E.D. Pa. 1974), which involved an apparent pedophile whom, according to the Boy Scouts' allegations, was reputed to be gay. See, e.g., Brief for Petitioner at 5, *Boy Scouts* (No. 99-699) (citing *Teal* for a proposition it does not support); Petitioner's Reply Brief at 3 n.3, *Boy Scouts* (No. 99-699) (citing *Teal* without explanation); Supplemental Brief of Boy Scouts of Am. & Monmouth Council, *Boy Scouts of Am.* at 18, *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999) (No. A-2427-95T3) (describing *Teal* as involving simply "a reputed homosexual" and thereby implicitly equating homosexuality and pedophilia); Jurisdictional Statement at 18, *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 468 U.S. 1205 (1984) (No. 83-1513) (calling *Teal* "a similar case" to *Curran* and simultaneously citing it for the proposition that young boys are "'vulnerable and malleable'" (emphasis added)). These representations are hardly consistent with the Boy Scouts' disavowal or, for that matter, with its self-proclaimed identity as a paragon of honor.

178. See, e.g., Bunmi O. Olatunji, Jeffrey M. Lohr & Suzanne A. Meunier, Emotional Mediators of Homophobia: Implications for Construct and Psychometric Validity, Presentation at Annual Convention of the American Psychological Society, June 9, 2002 (finding, among other things, correlation between antigay attitudes and feelings of disgust and fear of contamination) (presentation slides on file with author). See also Keith Taylor, *No Fear Factor in 'Homophobia,' Study Claims: Researchers Say Anti-Gay Prejudice Rooted in Disgust, 'Contamination' Concerns*, WASH. BLADE, June 28, 2002, available at <http://www.washblade.com/national/020628b.htm>.

The Boy Scouts' legal arguments have at times also indicated that this sort of simple revulsion or animosity was a purpose or even a *justification* for its exclusion of openly gay men from positions as scout leaders. See, e.g., Respondent's Brief, at 36, *Curran* (Civ. No. 66755) ("The time may come when persons *made uncomfortable by the company of homosexuals* express the dissident, minority view. Then, however, as now, those persons will be guaranteed their right to cling to their beliefs." (emphasis added)). The Scouts argued that the plaintiff, an openly gay man excluded from a position as a scout leader

asks this Court to compel the Boy Scouts to admit unwanted persons into their hikes, their overnight camping trips, and their patrol meetings, *even though patrol meetings often are held in the home of one of the Boy Scouts . . .* Such compulsion . . . would force young citizens and their parents either to *admit the unwanted persons into their homes* or to abandon" the Boy Scouts.

Id. at 34 (emphasis added).

179. The Boy Scouts' objection might be characterized as an objection to being treated as though it was an ordinary public enterprise when, in its view, it was not similarly situated. That objection, however, runs squarely into the problem that, as current constitutional doctrines of discrimination are constructed, they do not recognize failure to accommodate difference as a violation of the equality prin-

Perhaps the only way to find effective targeting in *Boy Scouts* is to somehow conclude that discrimination generally, in Scalia's words, is "conventionally expressive," even when it seems to have no expressive quality. It would not be sufficient merely to assert that public-accommodation discrimination *can* be expressive, for as Scalia has dismissively observed, "virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."¹⁸⁰ In order to establish effective targeting based solely on a general prohibition of discrimination, one must be able to say that the prohibited discrimination is normally engaged in for expressive reasons. On that view, the very act of singling out public accommodation discrimination for prohibition would amount to singling out a form of expression for prohibition.

Perhaps surprisingly, liberal Professor Laurence Tribe has articulated a theory justifying *Boy Scouts* along those lines. He has suggested, in essence, that discrimination is different because "one man's discrimination is another's expression of a moral view."¹⁸¹ Before rushing to salvage racial and gender equality from his First Amendment condemnation,¹⁸² Tribe flatly asserted that "[w]hen the state decides to prohibit refusals to associate based on a given characteristic . . . [,] it is rarely, if ever, enacting a 'neutral' rule. . . . Rather, . . . the state is making an intrinsically contestable statement about the *rightness or wrongness* of using the characteristic in question as a criterion for association."¹⁸³ For that reason, he saw not only effective targeting but even intentional suppression of expression in most (if not all) applications of antidiscrimination law.¹⁸⁴ Such a broad assumption would be necessary to establish under Scalia's *Smith* methodology that discrimination is conventionally expressive in such a way as to support the

ciple even if, philosophically, they may be characterized as such. Compare *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (characterizing equal protection as "essentially a direction that all persons similarly situated should be treated alike" but mentioning no extension of the principle to forbid treating of dissimilarly situated persons differently or, in other words, failing to accommodate differences), with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (requiring public entities to reasonably accommodate differences deriving from covered disabilities). Cf. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1987) (criticizing the "built-in tension . . . between [the legal] concept of equality, which presupposes sameness, and [the legal] concept of sex, which presupposes difference").

180. *Barnes v. Glen Theate, Inc.*, 501 U.S. 560, 576 (1991). See also *id.* at 579 ("[A]lmost anyone can violate almost any law as a means of expression.").

181. Tribe, *supra* note 7, at 651.

182. *Id.* at 654 (offering argument to "prevent *Boy Scouts of America v. Dale* from jeopardizing the application" of laws prohibiting race and gender discrimination).

183. *Id.* at 653 (emphasis in original).

184. *Id.* at 653 n.75.

conclusion that even general regulation of discriminatory conduct necessarily amounts to effective targeting of expression.

Whatever the merits of Tribe's argument—which seems dubious, at best¹⁸⁵—his contentions are inconsistent with Scalia's jurisprudence in at least a couple of respects. First, Scalia does not seem to share Tribe's expansive view of the First Amendment as, in essence, prohibiting the government from "making an intrinsically contestable statement about the *rightness or wrongness*" of anything or, alternatively, as prohibiting the government from ever "imposing its vision of the good life on everybody"¹⁸⁶ against those who want to engage in contradictory conduct in order to articulate or follow a competing vision of the good life.¹⁸⁷ In sharp contrast, Scalia clearly agrees with *Bowers v. Hardwick*,¹⁸⁸ where the Court upheld a restriction on associational conduct based solely on the govern-

185. Among other things, Tribe's assumption completely obliterates the distinction between laws that target expression and those that incidentally regulate expression in the course of regulating a broader category of conduct that happens to have an expressive motive. After all, one man's harmful use of controlled substances is another man's practice of religion, but Tribe clearly does not suggest that all drug laws necessarily target religion because they may incidentally regulate religion in some applications, even though one motive for enacting them is moral disapproval of drug use. *See id.* at 651. Likewise, he concedes that some significant number of instances of prohibited discrimination are not expressive. *See id.* at 652 (acknowledging existence of instances of race and gender discrimination based not on moral views but on "ignorant stereotypes"). Although he would distinguish discrimination from drug use by suggesting that banning nonexpressive discrimination that rests solely on ignorant stereotypes nevertheless involves the government in taking a moral position, *see id.* at 653 n.75, the government's taking of a moral position does not thereby convert nonexpressive discrimination into expressive discrimination. By his own acknowledgement, expression is still at issue only "[w]hen the state's position on the matter can prevail only by significantly undercutting a particular individual's or group's ability to carry out its expressive . . . mission." *Id.* at 653. And that situation arises only when a general law happens to hit upon an instance in which regulated conduct has been engaged in for expressive—not ignorantly stereotypical—reasons. That fact, however, begs precisely the question about the distinction between targeting and incidental regulation that Tribe seeks to erase in the context of discrimination.

Also completely missing from Tribe's analysis is any explanation for his conclusion that the existence of a broad consensus against peyote use means, for First Amendment purposes, that it may be regulated, even though he endorses that tactic in an attempt to distinguish race and sex discrimination. *Id.* at 653. *Cf.* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 154–55 (1993) (distinguishing (self-servingly, one might add) race discrimination from sexual-orientation discrimination on the basis of a supposed social consensus against the former but not the latter). One would ordinarily expect a liberal like Tribe to insist that it is those individuals whose views are farthest from the mainstream who are most in need of First Amendment protection. His new view—that speech rights in this context ought to be essentially left to the ballot box—would protect only popular ideas.

186. Tribe, *supra* note 7, at 654.

187. *Cf.* CARTER, *supra* note 185, at 34 ("The state has a perfect right to send a message that it is wrong to discriminate on the basis of sexual orientation . . . [.] but government must not be allowed to conscript private organizations . . . to assist.").

188. 478 U.S. 186 (1986). That Scalia agrees with *Bowers* is almost an understatement. *See Romer v. Evans*, 517 U.S. 620, 636, 640–42 (1996) (Scalia, J., dissenting).

ment's supposed interest in making "an intrinsically contestable" moral statement.¹⁸⁹ More to the point, Scalia has specifically extended the *Bowers* reasoning to the First Amendment context in *Barnes* where he voted to uphold a law banning all public nudity, even as applied to the arguably expressive nude dancing at adult entertainment establishments, because "[m]oral opposition to nudity supplies a rational basis for [the] prohibition."¹⁹⁰ In direct contradiction to Tribe's concern about interference with diverse "vision[s] of the good life," Scalia pointedly emphasized his view that

[t]here is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution. . . . Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral.¹⁹¹

Whether any social consensus exists as to these moral opinions,¹⁹² moreover, is irrelevant to Scalia, for he went on to explain that "[w]hile there may be great diversity of view on whether various of these prohibitions should exist . . . , there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality.'"¹⁹³ Tribe's view would also seem to contradict Scalia's express—and valid—concern that "virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."¹⁹⁴

Tribe's conception of antidiscrimination law as little more than morality legislation astonishingly adopts the discriminator's exclusive frame of reference. Although legislation like Title II of the Civil Rights Act of 1964,¹⁹⁵ prohibiting discrimination on the basis of race in the provision of public accommodations, is undoubtedly animated in part by morality con-

189. *Bowers*, 478 U.S. at 196 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."). The Court of course rejected Tribe's contrary argument there. See *id.* at 187 ("Laurence H. Tribe argued the cause for respondent Hardwick.").

190. *Barnes*, 501 U.S. at 580.

191. *Id.* at 575.

192. Tribe, *supra* note 7, at 653.

193. *Barnes*, 501 U.S. at 575 (emphasis added).

194. *Id.* at 576. See also *id.* at 579 ("[A]lmost anyone can violate almost any law as a means of expression.").

195. Pub. L. No. 88-352, tit. II, 78 Stat. 241 (1964).

cerns,¹⁹⁶ Tribe disregards both the tangible and intangible injuries to victims that may frequently result from discrimination,¹⁹⁷ particularly in an interdependent, industrial or post-industrial society with a sharp division of labor. New Jersey's civil rights law itself declared:

[B]ecause of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.¹⁹⁸

The law did more than simply make "an intrinsically contestable" moral statement, and it bordered on insulting for Tribe to proclaim otherwise.

Antidiscrimination laws, like other regulations of conduct, mediate conflicts between people who do not live in isolation from one another and whose conduct may injure each other. In mediating those disputes, laws obviously rest on value judgments in determining which party's interests ought to prevail in any given dispute. The Court acknowledged that reality in *Bowers*. Tribe surely would not argue that a murder law, in incidentally preventing involuntary human sacrifice, represents little more than morality legislation that is inherently suspect because it classifies on the basis of a vision of the good life, which in the case of ritual sacrifice represents an exercise of religion. Where either expression, association, or religion require or prohibit conduct that inflicts injury or imposes costs on other individuals, the government, through law, confronts a zero-sum dispute, and it might choose between either requiring internalization of costs or permitting externalization of them.¹⁹⁹

196. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid.").

197. *Id.* ("In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.").

198. N.J. STAT. ANN. § 10:5-3 (West 2001).

199. Whatever might be true in an employment discrimination case, one might argue that James Dale experienced no such costs. Such a dispute-erasing assumption would be convenient but incorrect. As his complaint alleged, the secret nature of the Boy Scouts antigay membership policy induced Dale and his family to invest in the organization in both tangible and intangible ways, raising issues not only of expectancy and opportunity cost but also of emotional injury and self-identity. See Complaint ¶ 58, *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995), reprinted in Joint Appendix at 6, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) ("As a result of de-

The question Tribe's analysis raises is whether antidiscrimination law is somehow different. May the government choose, through general laws not targeting First Amendment interests, to require the human sacrificer as well as the discriminator to internalize the costs of his behavior, or does the First Amendment render the government constitutionally incapable of preventing those actors from imposing the costs of their conduct on others? Does discrimination permit involuntary creation of constitutionally mandated, interpersonal subsidies—whether financial, physical, or emotional—from the victim to the discriminator? Conceiving of an antidiscrimination law as little more than a statement of moral condemnation of the discriminator's philosophy and disregarding the role of such a law in forcing the discriminator to internalize the costs he would involuntarily impose upon others conceptualizes discrimination solely from the perspective of the supposedly "put-upon" discriminator. Yet in *Bowen v. Roy*²⁰⁰ and *Lyng v. Northwest Indian Cemetery Protective Association*,²⁰¹ the Court made clear that "for the adjudication of a constitutional claim, [it is] the Constitution," not the challenger's religion or (by extension) his personal philosophy, that "must supply the frame of reference."²⁰²

defendants' promises and omissions, plaintiff spent four years of his life expending time, money and energy in service to the Boy Scouts, years that could have been spent in an organization that would have welcomed him as a lifetime member."); Complaint, Request for Relief, *Boy Scouts* (No. MON-C-330-92), reprinted in Joint Appendix at 27, *Boy Scouts* (No. 99-699) (seeking "compensatory and punitive damages for the emotional pain and suffering [Dale] has experienced"); Affidavit of Gerald Dick (father of James Dale) ¶¶ 13, 19, *Boy Scouts* (No. MON-C-330-92), reprinted in Joint Appendix at 143, 146, *Boy Scouts* (No. 99-699). In the words of Dale's father:

Neither James' commitment to Scouting nor my own involvement with BSA was limited to an investment of time and energy: we both made a significant financial commitment to BSA as well. I purchased uniforms and camping gear for myself, took time off from work . . . , and spent money on gas My wife and I paid for James to attend Scout camp each year, sometimes for more than one session a year. James spent considerably more money on Scouting—most of it money that he earned himself in his part-time or summer employment. . . .

When James received a letter from BSA . . . telling him that his BSA membership had been revoked, both James and I were enormously shocked and distraught. James was extremely upset that he had been expelled from an organization to which he had devoted so much time and energy, and to which he felt such loyalty. James had focused on his Scouting experience for so long and so successfully that it had become an essential part of how he defined himself and how others saw him. . . . James' expulsion from BSA was a devastating experience for him and for our family

Id. Relatedly, one might consider the monopoly effect of the Boy Scouts' dominance of this marketing niche, dominance that ensures no inclusive, competing organization will rise as an alternative. Professor Tribe's view trivializes or, indeed, deems wholly immaterial these externalities of the Boy Scouts' behavior in recasting New Jersey's statute as doing nothing but making a moral statement.

200. 476 U.S. 693 (1986).

201. 485 U.S. 439 (1988).

202. *Roy*, 476 U.S. at 701 n.6. See also *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (defining symbolic speech as conduct intended to communicate a message *and being objectively understood as such*).

More to the point, Tribe's argument that all governmental regulation of discrimination targets conventionally expressive conduct conflicts with Scalia's treatment of First Amendment challenges to antidiscrimination legislation. In *R.A.V. v. City of St. Paul*,²⁰³ Scalia, writing for the Court, invalidated a local ordinance banning certain forms of discriminatory hate speech. Because the ordinance targeted such speech on the basis of content, Scalia applied strict scrutiny and invalidated the ordinance. He expressly noted, however, that where a law did not target *speech* but, instead, targeted discriminatory acts, such acts "are not shielded from regulation merely because they express a discriminatory idea or philosophy."²⁰⁴ Scalia, then, apparently recognizes an analytical distinction between nonexpressive and expressive discriminatory acts, such that it is possible for the government to regulate discrimination generally without specifically targeting expression. Scalia implemented that view by joining the majority opinion in *Wisconsin v. Mitchell*,²⁰⁵ which upheld sentence enhancements for bias-motivated crimes despite the fact that such discriminatory acts often express an idea or philosophy and are normally intended to do so.

Unlike Professor Tribe, the Boy Scouts offered only an anemic argument—occupying exactly one paragraph in its forty-seven-page brief²⁰⁶—in support of the contention that New Jersey's public-accommodation law targeted expression. The argument rested on three conclusory observations. First, the public-accommodation law had an impact on the Boy Scouts' expression. Second, the New Jersey Supreme Court made isolated references to "prejudice" and "bigotry" in its opinions in the case. And third, Dale himself supposedly admitted to pursuing the litigation against the Boy Scouts in order to make a point.²⁰⁷ The first and third of these observations were irrelevant to the question whether the public-accommodation law targeted expression in Scalia's *Smith* jurisprudence, and the second one was insufficient for a number of reasons.

The first observation was irrelevant because it noted nothing more than that the public-accommodations law had the incidental effect of restricting expression as applied to the particular facts of *Boy Scouts*. The same was true in *Smith* and *Barnes* and any case in which a challenger has First Amendment standing. The core feature of Scalia's *Smith* jurisprudence, however, is that incidental effects on First Amendment interests are

203. 505 U.S. 377 (1992).

204. *Id.* at 390 (emphasis added).

205. 508 U.S. 476 (1993).

206. Brief for Petitioners at 44, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

207. *Id.*

insufficient, without more, to trigger heightened scrutiny. This first observation, then, simply denies the fact that an incidental effect on expression is categorically different from the *targeting* of expression.

The third observation was similarly irrelevant. Whatever Dale's motive was—and the Court did not embrace the Boy Scouts' view of the matter—it has no bearing on the question whether the state's public-accommodation law targeted expression. Even if Dale were motivated by a desire to make a point in filing his complaint, his motive is hardly attributable to New Jersey's decision to either enact or enforce its public-accommodation law. That the law may have had the effect of assisting Dale in his expressive quest is nothing but a variation on the claim that the public-accommodation law had an incidental effect on the Boy Scouts' expression. Dale's supposed motive was presumably no more relevant in Scalia's *Smith* jurisprudence than were the anti-Santeria statements of citizens in *Lukumi Babalu Aye*, which Scalia expressly refused to consider.

The second observation—that the New Jersey Supreme Court made isolated references to “prejudice” and “bigotry” in ruling against the Boy Scouts—fails to demonstrate the requisite targeting of expression. First, like Dale's supposed motive in filing suit, statements by the justices of the New Jersey Supreme Court in adjudicating the case seem little different from statements of the legislators who enacted the law in *Lukumi Babalu Aye*. The Boy Scouts' citation of these statements seemed, at best, calculated to identify the subjective motive of the state court justices. As Scalia made clear in *Lukumi Babalu Aye*, however, the subjective motive of governmental decisionmakers is irrelevant to his First Amendment analysis. For him, effective targeting without subjective animus is constitutionally impermissible, but subjective animus without effective targeting is not. The question is whether expression was effectively targeted, not whether there was a desire to do so, however effectively or ineptly implemented.

Even if Scalia were to treat the isolated references to “prejudice” and “bigotry” as relevant in his *Smith* jurisprudence, they were at best only “stray remarks”²⁰⁸ of minimal probative value. The New Jersey Supreme Court's statutory interpretation rested on solid ground, unrelated to the effect of the law on the Boy Scouts' expression. In longstanding precedents, that court had already held that the public accommodation law applied to a day camp for children²⁰⁹ and, more tellingly, to Little League Baseball,²¹⁰

208. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

209. *See Fraser v. Robin Dee Day Camp*, 210 A.2d 208, 211 (N.J. 1965).

which, like the Boy Scouts, was a federally chartered organization established to promote fitness, teach values, and develop “citizenship, sportsmanship, and manhood.”²¹¹ Although the Boy Scouts might find the comparison objectionable, it hardly required animus to extend those precedents to an organization with a mission of educating children through the use of outdoor recreational activities. Indeed, relying on factors articulated in those and other precedents, the New Jersey Supreme Court reasonably concluded that the Boy Scouts was a public accommodation because it engaged in “broad public solicitation,”²¹² maintained “close relationships with federal and state governmental and with other recognized public accommodations,”²¹³ and resembled “many of the recognized and enumerated places of public accommodation.”²¹⁴ The New Jersey Supreme Court’s thorough and well-supported reasoning overwhelms any contention that the court’s statutory interpretation was simply a product of result-oriented animus against the Boy Scouts’ beliefs or expression.²¹⁵ That con-

210. See *Nat’l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974), *summarily aff’d*, 338 A.2d 198 (N.J. 1974).

211. 36 U.S.C. § 1073 (1970). Unlike the decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (1999), however, Congress agreed with the result in *Little League Baseball* and immediately amended the Little League charter to include girls. See Pub. L. No. 93-551, 88 Stat. 1744 (1974).

212. 734 A.2d at 1211. The court cited advertising campaigns, recruitment activities, and even the symbolic invitation extended by boys wearing their uniforms to school, which Boy Scouts apparently encouraged in order to generate interest. *Id.*

213. *Id.* The court noted BSA’s federal charter, its relationships with the President and the military, in-kind support provided by state governments, sponsorship of troops by local government agencies, and the organization’s extensive access to public schools. *Id.* at 1211–13.

214. *Id.* at 1213. Borrowing Judge Cummings’ retort, “[p]laces do not discriminate; people who own and operate places do” *Id.* at 1210 (quoting lower court opinion quoting *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1782 (7th Cir. 1993) (Cummings, J., dissenting)). The court adhered to the view that the term *place* was merely “‘a term of convenience, not of limitation.’” *Dale v. Boy Scouts of Am.*, 734 A.2d at 1209 (quoting *Little League Baseball*, 318 A.2d at 37).

215. Nor must one agree with the New Jersey Supreme Court’s statutory interpretation in order to conclude that it was a reasonable interpretation of the statute unrelated to any subjective intent to interfere with expression. Indeed, in another public-accommodation case involving the Boy Scouts, involving a woman whom the Boy Scouts denied the opportunity to serve as a scout leader because of her sex, the Connecticut Supreme Court quite arguably had the better take on the applicability of public accommodation laws to the Boy Scouts decisions to employ scout leaders. See *Quinnipiac Council, Boy Scouts of Am. v. Comm’n on Hum. Rights & Opportunities*, 528 A.2d 352, 358 (Conn. 1987). There, the court rejected the woman’s discrimination claim because, although the Boy Scouts did constitute a public accommodation, it reasoned that “a statute that addresses a discriminatory denial of *access to goods and services* does not, on its face, incorporate an allegedly discriminatory refusal by an enterprise to avail itself of a claimant’s desire to *offer services*.” *Id.* at 360. Rather, the court reasoned, such a dispute more naturally fit the model of an employment discrimination claim, a claim not before the court. *Id.* (noting that a statutory exception, available in employment-discrimination law, for situations in which a protected trait is a “bona fide occupational qualification” would offer “a proper framework” for resolving the dispute at hand). See also *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1422 (N.D. Ill. 1990).

The Connecticut Supreme Court's sensible decision in *Quinnipiac Council*, though not followed elsewhere, represents perhaps the soundest approach to scout-leader-discrimination cases. Since a scout leader—as opposed to an actual scout—is basically the instructional agent employed by the Boy Scouts to supervise youths, a scout leader's selection does seem to resemble a hiring decision more closely than a decision about providing goods or services to a customer, the traditional paradigm of public-accommodation law. *Cf.* *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 n.1 (2001) (noting circuit split over question whether employment discrimination claims may be brought under Title II of the Americans with Disabilities Act, which prohibits disability discrimination by public entities, or may be brought only under Title I, which prohibits employment discrimination); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) (holding employment discrimination claim could not be brought under Title IX of the Education Amendments of 1972, which prohibits discrimination in educational programs receiving federal funds, but may be brought only under Title VII, which prohibits employment discrimination generally). *Cf. also* Jason Powers, Note, *Employment Discrimination Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements*, 76 TEX. L. REV. 1457 (1998) (arguing that public employees should be required to litigate employment discrimination claims under Title I rather than Title II of the ADA).

The *Quinnipiac Council* approach, however, would likely leave the Boy Scouts free in most jurisdictions to discriminate with respect to unpaid scout-leader positions. A growing body of precedent holds that employment discrimination laws do not apply to unpaid volunteers. *See* *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243-44 (11th Cir. 1998); *O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997); *Graves v. Women's Prof'l Rodeo Assoc.*, 907 F.2d 71, 73 (8th Cir. 1990). *Cf.* *Haavistola v. Community Fire Co.*, 6 F.3d 211, 219 (4th Cir. 1993). *But see* RESTATEMENT (SECOND) OF AGENCY § 225 & cmt. a (“One volunteering services without an agreement for or expectation of reward may be a servant of the one accepting such services. . . . Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant.”). Although Dale alleged employment discrimination as a separate basis for recovery, *see* Complaint ¶¶ 39-43, *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Law Ch. Nov. 3, 1995), *reprinted in* Joint Appendix at 22-23, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), the trial court dismissed that claim on this exact ground. *See* *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Law Div. Nov. 3, 1995), *reprinted in* Appendix to Petition for a Writ of Certiorari at 155a, 210a, *Boy Scouts* (No. 99-699) (following *Graves* and holding that, as a volunteer, Dale was not protected under provision banning employment discrimination). *But see infra* note 216 (describing apparent religious bias of trial judge). Dale apparently did not appeal that portion of the trial court's decision, for the intermediate appellate court made no reference to it. *See* *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998). Other scout leader cases, however, have involved paid positions, including one case the Boy Scouts chose to settle. *See* *Lanzi v. Boy Scouts of Am.*, No. 1037581 (Cal. Super. Ct. filed Dec. 6, 2000) (LEXIS, CA Superior Court Civil Case Index—Santa Barbara County) (involving discharge of openly gay man from paid position); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759 (Ill. App. Ct. 2001), *appeal denied*, 763 N.E.2d 316 (Ill. 2001) (involving refusal of Boy Scouts to hire openly gay man for paid position). For background on the *Lanzi* case, *see* *Gay Leader Settles Suit Against Boy Scouts*, L.A. TIMES, Jun. 16, 2002, at B6 (noting confidential settlement); Sally Ann Connell, *Scout's Ban on Gays Splits Community*, L.A. TIMES, Mar. 5, 2001, at A3 (describing case); Mary O'Gorman, *The Santa Barbara County HRC Confronts the Boy Scouts Policy of Discrimination*, THE CONNECTION: NEWSLETTER OF THE CALIFORNIA ASSOCIATION OF HUMAN RELATIONS ORGANIZATIONS, Winter 2000, available at http://www.cahro.org/html/winter_2000_6.html (same).

Of course, while the discriminatory exclusion of an adult volunteer scoutmaster from either a paid or unpaid position perhaps ought to be treated exclusively as a matter of employment discrimination, the discriminatory exclusion of a boy (or a girl) from participation in scouting seems far closer to the traditional paradigm of public accommodations discrimination and thus presents a stronger claim for statutory coverage under a public accommodations law. *Cf.* *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (involving exclusion from swimming pool association); *Sullivan v. Little*

conclusion draws additional support from the fact that *every* state appellate judge to consider the case interpreted the public accommodation law as applicable to the Boy Scouts.²¹⁶

Furthermore, even if the isolated references to “prejudice” and “bigotry” were more than stray remarks, they did not establish any necessary connection to the Boy Scouts’ expression. For example, as apparently used in the New Jersey Supreme Court’s opinion, the word “prejudice” means “an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics.”²¹⁷ In context, it does not necessarily, or even evidently, refer to expression. The court used the word “prejudice” after effectively concluding that the Boy Scouts’ expression-related reason for expelling Dale was a pretext, for in that court’s view the organization had no articulated message about homosexuality. Instead, the court found that Dale’s expulsion rested not on any view about the morality of his private conduct but on his status of being gay—a motive the court called prejudice.²¹⁸ Similarly, in *Lukumi Babalu Aye*, the majority explained that use of the words “ritual” and “sacrifice” in city ordinances prohibiting ritual animal sacrifice did not conclusively establish facial targeting of religion, where those words, despite their religious origin and connotation, “admit[ted] also of secular meanings.”²¹⁹ Words like “preju-

Hunting Park, Inc., 396 U.S. 229 (1969) (same); *Stout v. YMCA*, 404 F.2d 687 (5th Cir. 1968) (involving denial of access to fitness facilities); *Nesmith v. YMCA*, 397 F.2d 96 (4th Cir. 1968) (same). Courts, however, have so far avoided that conclusion. See *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993) (holding exclusion of religiously objecting boy from scouting did not violate public accommodations law); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998) (same); *Yeaw v. Boy Scouts of Am.*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997), *review dismissed*, 77 Cal. Rptr. 2d 705 (Cal. 1998) (holding exclusion of girl from scouting did not violate public accommodation law); *Mankes v. Boy Scouts of Am.*, 137 F.R.D. 409 (S.D. Fla. 1991) (same); *Minnesota ex rel. Beaulieu v. Boy Scouts of Am.*, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992) (same); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) (same).

216. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1245 (N.J. 1999) (Poritz, C.J., for the majority, joined by O’Hern, Garibaldi, Pollock, Stein, and Coleman, JJ.); *id.* at 1230–34 (Handler, J., concurring in relevant part); *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. App. Div. 1998) (Havey, P.J.A.D., joined by Newman, J.A.D.); *id.* at 293–94 (Landau, J.A.D. concurring in relevant part). The lone dissenter on this point was the trial judge, who ruled for the Boy Scouts on every issue in the case and seemed as influenced by his personal beliefs about both the immorality of homosexuality and the propriety of regulating the Boy Scouts as by his often thin and conclusory legal analysis. See generally *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Ch Div. Nov. 3, 1995), *reprinted in* Appendix to Petition for a Writ of Certiorari at 155a–224a, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

217. MERRIAM-WEBSTER’S NEW COLLEGIATE DICTIONARY 919 (10th ed. 1994). *Id.* at 112 (defining “bigot” as “a person obstinately or intolerantly devoted to his or her own opinions and prejudices”).

218. See *Dale*, 734 A.2d at 1226.

219. See 508 U.S. 520, 533–34 (1993).

dice” and “bigotry” likewise admit of meanings unrelated to condemnation of anyone’s expression. Scalia’s *Smith* jurisprudence does not seem to permit a showing of impermissible targeting in this way.

In the final analysis, the Boy Scouts never complained that the New Jersey civil rights law had *singled out* the organization for disfavored treatment. It complained about being swept into the coverage of the statute along with all manner of other enterprises serving the public. But that problem is not the kind of expressive gerrymandering that triggers heightened scrutiny in Scalia’s *Smith* jurisprudence. The Boy Scouts wanted a special exemption from the public-accommodation law, and when the New Jersey Supreme Court rejected the organization’s statutory arguments for one, the Boy Scouts converted its statutory arguments for exemption into a constitutional demand for one. Whatever the merits of the organization’s position as a matter of policy, its desire for a special exemption did not transform the New Jersey civil rights law into a regulation specifically directed at expression.

2. Association

In contrast to the law’s application irrespective of expression, New Jersey’s civil rights law did specifically target *association* as a general concept, but that targeting, despite the Court’s suggestion to the contrary, was not constitutionally relevant under Scalia’s *Smith* jurisprudence. On its face the law specifically prohibited covered enterprises from discriminating; in other words, the law forbade *disassociation* and thereby compelled association. Such a regulation may be said to target association in general. That recognition does not harmonize Scalia’s vote with his *Smith* jurisprudence, however, because association in general is *not* an interest protected by the First Amendment. Only one subcategory of association receives First Amendment protection—*expressive* association. Thus the fact that New Jersey’s civil rights law specifically targeted association did not mean it specifically targeted *expressive* association, the constitutionally relevant interest.

Although New Jersey’s law targeted all sorts of association, from a lunch counter’s exclusion of certain customers²²⁰ to a youth sports league’s

220. See N.J. STAT. ANN. § 10:5-5(l) (West 2001) (defining “place of public accommodation” to include, among many other things, “any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises”).

exclusion of certain children,²²¹ the First Amendment does not protect freedom of association (or disassociation) in the undifferentiated sense in which the New Jersey law targets it. While substantive due process provides limited protection to certain forms of highly intimate association, the First Amendment offers protection only to association that may be characterized as *expressive*.²²² The rest—nonintimate and nonexpressive association—receives no greater constitutional protection than any other form of

221. See *Nat'l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974).

222. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (distinguishing expressive and intimate association). Since the constitutional freedom of intimate association derives not from the First Amendment but from substantive due process principles, one may fairly ask whether—since *Bowers v. Hardwick*, 478 U.S. 186 (1986), limited the analogous constitutional right of privacy to matters concerning “family, marriage, or procreation,” *id.* at 191—the freedom of intimate association retains any independent vitality. Although neither the Court of Appeals nor the Supreme Court in *Bowers* cited the discussion of intimate association in *Roberts*, the Court of Appeals had loosely used that phrase in describing the alleged right in question. See, e.g., *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985). The Supreme Court acknowledged that usage. See *Bowers*, 478 U.S. at 189 (describing the Court of Appeals as having held that a state sodomy prohibition violated the challenger’s “fundamental rights because his homosexual activity is a private and intimate association.”). The *Roberts* opinion, moreover, grounded the freedom of intimate association in substantive due process and relied on some of the same key precedents that the Court considered in *Bowers*. Compare *Roberts*, 468 U.S. at 618–20, with *Bowers*, 478 U.S. at 190. When the Court has mentioned the freedom of intimate association since *Bowers*, it has emphasized language in the *Roberts* opinion describing the freedom as applicable to “intimate human relationships,” *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (quoting *Roberts*, 468 U.S. at 617), or to “those [personal bonds] that have ‘played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs,’” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (quoting *Roberts*, 468 U.S. at 618–619). Both formulations seem consistent with *Bowers*’ narrow formulation of the right of privacy. See also *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (describing family as “society’s most intimate association”).

Since *Bowers*, moreover, the Court has kept the freedom of intimate association at arm’s length. It has not invalidated a single statute as violating the freedom. See generally *FW/PBS* (upholding zoning ordinance that classified as sexually oriented businesses motels that rent rooms for fewer than ten hours); *Stanglin*, 490 U.S. 19 (upholding ordinance limiting use of dance halls to persons between ages of fourteen and eighteen); *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988) (upholding ordinance prohibiting public accommodation discrimination by private clubs having more than 400 members and satisfying other statutory criteria). Nor has the Court even considered the freedom since 1989, even where one might have imagined it to have been relevant. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (invalidating grandparents’ visitation statute as violation of right to privacy but not mentioning freedom of intimate association). Indeed, the Court expressly distanced itself from the concept of intimate association in *Kyllo v. United States*, 533 U.S. 27 (2001) (holding use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion and use of thermal imaging to measure heat emanating from home were both searches), where it specifically discounted a passing reference to “intimate association” in a prior search case. See *id.* at 38 n.5 (quoting reference to “intimate association” in *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986), and explaining that “the Court’s focus in this second-hand dictum was not upon intimacy but upon otherwise-imperceptibility, which is precisely the principle we vindicate today”).

conduct, like nonreligious drug-use, nonexpressive public nudity, or nonexpressive destruction of a draft card. Chief Justice Rehnquist himself, the author of the majority opinion in *Boy Scouts*, wrote for the Court in *City of Dallas v. Stanglin*²²³ that “the Constitution recognizes [no] generalized right of ‘social association’”²²⁴ The New Jersey law specifically targeted a generalized concept of commercial or social association that in certain applications happened to contain some expressive association within its perimeter.

In other words, New Jersey’s law was analogous to the kind of laws at issue in *Smith*, *Barnes*, and *O’Brien*. On its face it targeted association broadly, not just expressive association. Nor did anything in the law’s actual operation suggest a latent targeting of only expressive association. As the legislature explicitly found, “people suffer personal hardships” as a result of discrimination,²²⁵ and the law was directed at alleviating those hardships, including emotional injuries. To use the Cubist metaphor, it regulated discrimination in order to address the harmful, nonexpressive aspect of such conduct, not to interfere with any expressive aspect that might coexist in certain instances of discrimination. The law may have specifically targeted association, but it produced only the incidental restriction of *expressive* association. The Boy Scouts’ challenge, even granting that the law “significantly affected” the organization’s expression, fit squarely within the *O’Brien* paradigm. The Court might have justified intermediate scrutiny in *Boy Scouts* on the simple ground that *O’Brien* had authorized such scrutiny even in the case of incidental restriction of expressive conduct.

Scalia, however, could not. His *Smith* jurisprudence presented the majority with a problem. Dale argued that the Boy Scouts’ challenge involved, at most, only the incidental restriction of expressive conduct and thus should have been governed by *O’Brien*, if anything.²²⁶ *Scalia* could not join an opinion of the Court resting on that proposition. Indeed, if it were true that the case fit within the *O’Brien* paradigm, *Scalia*’s *Smith* jurisprudence would compel him to dissent. In that jurisprudence he does not regard the First Amendment as even applicable to scenarios governed by *O’Brien*.

223. 490 U.S. 19 (1989).

224. *Id.* at 25.

225. N.J. STAT. ANN. § 10:5-3 (West 2001). See also *supra* note 198 and accompanying text.

226. Respondent’s Brief at 45, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (“For state regulations that are not directed at speech, but that nonetheless place a limit on constitutionally protected expressive conduct, *O’Brien* . . . sets the governing First Amendment standard.”).

In order to paper over this problem, the majority distinguished *O'Brien* in a paragraph that, even with great reluctance, one can only call disingenuous. The majority opinion tersely rejected Dale's argument that *O'Brien* controlled resolution of the case to the extent the New Jersey law affected the Boy Scouts' expression. The majority reasoned—in full—as follows:

Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien* to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech—in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. *But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection.* Thus, *O'Brien* is inapplicable.²²⁷

Asserting that there was any distinction between *Boy Scouts* and *O'Brien* amounted to an act of raw power, not an application of logic, for there was no comprehensible distinction. The law at issue in *O'Brien* “directly and immediately” affected draft-card-burning rights by subjecting that conduct to *criminal* prosecution, and as applied in *O'Brien* the law affected expressive rights “that enjoy First Amendment protection.” What the passage perfectly described was a scenario of incidental restriction of expressive association—a scenario in which Scalia's *Smith* jurisprudence denies the First Amendment any application.

This response to Dale's *O'Brien* argument was troubling for what it implied. Members of the majority other than Scalia might have ignored that argument. They could simply have pointed out that *Roberts* provided the controlling standard and that it authorized strict scrutiny even in cases of incidental restriction of expressive association. Why address the *O'Brien* argument at all? If one postulates that Scalia in fact views his *Smith* jurisprudence as a general theory of the First Amendment, it would have been difficult for him to join an opinion that failed to distinguish *O'Brien*. Because extension of his *Smith* jurisprudence to expressive association would require him to reject the *Roberts* authorization of heightened scrutiny in cases of only incidental restriction, failing to distinguish *O'Brien* would mean failing to establish impermissible targeting, which Scalia's *Smith* jurisprudence requires in order to trigger heightened scru-

227. *Boy Scouts*, 530 U.S. at 659 (citation omitted; emphasis added).

tiny. One may surmise that the majority's dubious attempt at distinguishing *O'Brien* was an attempt to conceal the fact that Scalia was joining an opinion that applied heightened First Amendment scrutiny based solely on an incidental restriction of First Amendment interests, a proposition he has expressly rejected in the *Smith* jurisprudence. Inclusion of the *O'Brien* passage is otherwise difficult to explain.

In the final analysis, then, examining neither expression nor association leads to the conclusion that the New Jersey law at issue in *Boy Scouts* impermissibly targeted First Amendment interests and, for that reason, triggered heightened scrutiny under Scalia's *Smith* jurisprudence. On the one hand, the law simply did not target expression, which is a First Amendment interest, and on the other hand, the generalized liberty of association that it did target is not a First Amendment interest. The New Jersey civil rights law was a general law, applicable alike to all sorts of association, and it happened to produce incidental restrictions on some kinds of associational conduct entitled to First Amendment protection. One cannot harmonize Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence by identifying any specific targeting of any *First Amendment* interest.

IV. INCIDENTAL COMPULSION IN *BOY SCOUTS*

If avoiding Scalia's *Smith* jurisprudence entirely or finding impermissible targeting within its strictures are not persuasive theories for reconciling Scalia's vote in *Boy Scouts* with that jurisprudence, there remains one final matrix of theories that might harmonize them. Even within Scalia's *Smith* jurisprudence, there are instances in which he has endorsed the application of heightened scrutiny based merely on a law's incidental restriction of First Amendment interests. Specifically, he has required the higher showing of impermissible targeting only where individuals challenge the enforcement of *conduct* regulations. He has made clear, however, that mere incidental restrictions upon actual speech or religious belief—as distinguished from expressive or religious conduct—may trigger heightened scrutiny without any showing of impermissible targeting. This nuance of his *Smith* jurisprudence arguably extends to incidental *compulsion* of actual speech or religious belief. This explains Scalia's vote in *Hurley*, and provides the best basis for attempting to rationalize his vote in *Boy Scouts*.

A. INCIDENTAL RESTRICTION OF ACTUAL SPEECH

In Scalia's view, not all communication is created equal, and not all communication is entitled to the same degree of First Amendment protec-

tion. In particular, Scalia distinguishes between actual speech—whether oral or written—and conduct that happens to contain “‘expressive elements,’”²²⁸ including so-called symbolic speech. While his opinion in *Barnes* made clear that only impermissible targeting of expressive *conduct* triggers heightened scrutiny, he simultaneously explained that even *incidental restriction of actual speech* does.²²⁹

That Scalia recognizes a distinction between speech and conduct is not extraordinary. The Court itself has long done so. In *Cantwell v. Connecticut*,²³⁰ Justice Roberts provided the classic statement that, in the analogous context of religious freedom, “the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”²³¹ Likewise, Justice Brennan distinguished between levels of protection afforded speech and expressive conduct in his landmark opinion for the Court in *Texas v. Johnson*.²³²

Scalia’s similar embrace of such a distinction is unique in at least two ways. First, he has offered an explicitly textualist justification for it. Because the text of the First Amendment literally refers to freedoms of “speech” and “press,”²³³ Scalia reasons that protection of oral and written communication is intrinsic to the text of the First Amendment.²³⁴ Other forms of communication—such as expressive conduct—are protected only as part of what he called “the more generalized guarantee of freedom of expression,”²³⁵ a derivative (or penumbral) right inferred from the communication-protective function of the First Amendment.²³⁶ The text of the

228. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578 (1991) (Scalia, J., concurring) (quoting *Johnson*, 491 U.S. 397, 406 (1989)).

229. See *id.* (referring to government regulations that “‘directly or indirectly impede speech’” (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622–23 (D.C. Cir. 1983) (Scalia, J., dissenting))).

230. 310 U.S. 296 (1940).

231. *Id.* at 303–04.

232. See 491 U.S. 397, 406 (1989).

233. U.S. CONST. amend. I.

234. See *Watt*, 703 F.2d at 622 (Scalia, J., dissenting) Here, Scalia noted that when the Constitution said ‘speech’ it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address ‘freedom of the press’ separately . . . The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication. . . .

Id. Accord *Barnes*, 501 U.S. at 576 (Scalia, J., concurring) (“The First Amendment explicitly protects ‘the freedom of speech [and] of the press’—oral and written speech—not ‘expressive conduct.’”).

235. *Watt*, 703 F.2d at 622 (Scalia, J., dissenting).

236. Justice Scalia has recognized that a similar principle operates in the area of “constitutionally proscribable content.” Although “fighting words” and obscenity are, as a matter of constitutional policy, outside the intrinsic protection of the First Amendment’s text, as construed, those forms of commu-

Amendment itself requires greater protection for actual speech than for expressive conduct.

The second difference between Scalia's use of the speech-conduct distinction and its use by other members of the Court is the profoundness of its implications for the applicable standard of review. The full Court's expressive-conduct case law, embodied in *United States v. O'Brien*, recognizes a similar distinction, but it does not deprive expressive conduct of all First Amendment protection from incidental restriction. It merely reduces the standard of review to intermediate scrutiny in recognition of the special complexities presented by regulation of conduct, namely the Cubist dilemma. Scalia, in contrast, maintains that incidental restriction of expressive conduct is simply "not subject to First Amendment scrutiny at all."²³⁷

While Scalia's starker distinction dooms to constitutional irrelevance a showing of mere incidental restriction of expressive conduct, his reluctance to extend that dismissive rule to the incidental restriction of actual speech leaves open a potential alternative avenue for explaining his vote in *Boy Scouts*. If it were the case that New Jersey's public accommodation law even incidentally restricted actual speech, then the reasoning in the *Boy Scouts* majority opinion might not be fully consistent with Scalia's First Amendment jurisprudence, but at least its result would be.

Scalia's approval of heightened scrutiny based solely on the incidental restriction of actual speech, however, should not be read too broadly. In particular, one must be careful to distinguish between his conception of incidental restriction and a looser notion that might be called incidental *impact*. As I have explained previously in the case of expressive conduct, an incidental restriction arises when a law directly regulates conduct in order to address some harm related to a noncommunicative aspect of the conduct but as a necessary corollary, simultaneously restricts the expressive aspect of that conduct. The concept of incidental restriction in the case of actual speech is analogous. It involves the direct regulation of speech in an attempt to address some harm related to a noncommunicative aspect of the actual speech but, in doing so, necessarily restricts the communicative aspect as well. The Cubist dilemma, in other words, can arise with respect to actual speech as well as expressive conduct.

nication remain entitled to the very basic protection against content-based suppression. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-88 (1992) (Scalia, J.). Scalia has himself analogized this principle with the related concept of a generalized guarantee of freedom of expression at issue in expressive conduct cases. *See id.* at 385-86.

237. *Barnes*, 501 U.S. at 572 (Scalia, J., concurring).

Two of Scalia's favorite examples illustrate the incidental restriction of actual speech. In his *Barnes* opinion, Scalia cited *Saia v. New York*²³⁸ and *Schneider v. New Jersey*²³⁹ as examples. *Saia* involved an anti-noise ordinance prohibiting the use of sound amplification devices, presumably whether they were used to broadcast speech, symbolic sounds, noncommunicative noise, or simple static. As applied to the broadcast of actual speech, however, the ordinance interfered with that speech but only as an unavoidable corollary of controlling its volume, which contributed to noise pollution. The Court nevertheless invalidated the ordinance. *Schneider* likewise involved city ordinances that prohibited the distribution of handbills and, in the case of at least one, the distribution of any kind of paper in public spaces. Although the objective of the ordinances in the Court's view was not the suppression of written speech but the control of litter, the Court nevertheless invalidated the ordinances as incidental restrictions of actual speech.²⁴⁰ To Scalia, both cases represented examples of laws restricting speech "for a purpose that has nothing to do with the suppression of communication."²⁴¹ It is this scenario that he describes as incidental restriction of actual speech and acknowledges that it triggers heightened scrutiny, even though he holds that incidental restriction of expressive conduct does not.

In contrast to incidental restriction, the concept of an incidental impact on actual speech is far broader and presumably does not, in Scalia's view, trigger any First Amendment scrutiny, despite its effect on actual speech. *Arcara v. Cloud Books, Inc.*²⁴² is the leading example. There, the Court upheld the enforcement of a public nuisance law where the enforcement resulted in the closure of an adult bookstore because management had permitted prostitution on the premises. It was immaterial that the closure had incidentally impacted the bookstore's ability to distribute non-obscene printed materials, a form of actual speech. The Court explained, in effect, that heightened scrutiny applied only in instances of impermissible targeting or incidental restriction of activity that was *itself* expressive,²⁴³ but not

238. 334 U.S. 558 (1948).

239. 308 U.S. 147 (1939).

240. Given Scalia's methodology for discerning impermissible targeting, *see supra* Part III-A, one could argue that at least some of the ordinances at issue in *Schneider* impermissibly targeted expression.

241. *Barnes*, 501 U.S. at 576 (Scalia, J., concurring).

242. 478 U.S. 697 (1986).

243. *See id.* at 706-07. The court noted:

[W]e have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . .

Id.

where regulation of noncommunicative conduct had only an incidental impact on speech through a chain of causation. As Justice O'Connor observed in a concurring opinion, "the arrest of a newscaster for a traffic violation" does not violate the First Amendment.²⁴⁴

Seemingly one way to differentiate incidental restriction, which triggers First Amendment scrutiny, from incidental impact of the *Arcara* sort, which does not, is to ask whether a challenged regulation operates directly upon the acts comprising actual speech or acts that are not intrinsically part of actual speech. What act, in other words, does the law literally enjoin? In *Arcara*, the closure order operated directly upon the opening of a storefront to the public (and allowing prostitution to occur there). It did not operate directly upon the activity of selling printed material. While opening the storefront is part of a chain of acts that enable the selling of printed material and the distinction between the two is not razor sharp, *Arcara* indicates that the Court attempts to draw such a line based on a concept vaguely analogous to proximate cause in tort law.²⁴⁵ Presumably, Scalia's only significant disagreement with *Arcara*,²⁴⁶ decided before he joined the Court, is with its dictum endorsing heightened scrutiny of laws incidentally restricting expressive conduct as well as actual speech.

Reading *Saia* and *Schneider* in combination with *Arcara* and Scalia's *Smith* jurisprudence suggests that he would apply heightened scrutiny to a law that operated directly upon actual speech, even though the objective is unrelated to the communicative aspect of the speech, but that he would not apply heightened scrutiny to a law that operated directly upon an activity short of actual speech merely because the regulation of that activity, through a chain of causation, had an incidental impact on actual speech. For instance, Scalia would apply heightened scrutiny to a law incidentally restricting actual speech by prohibiting the broadcast of sound above a certain decibel level and including speech within its definition of sound, but he would not apply heightened scrutiny to a law that had an incidental impact

244. *Id.* at 708. The Constitution, however, grants such an immunity to members of Congress: The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. U.S. CONST. art. I, § 6, cl. 1 (emphasis added).

245. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

246. Although Justice Scalia was not a member of the Court when it decided *Arcara*, he joined at least one subsequent opinion approving (and extending) *Arcara*. See *Alexander v. United States*, 509 U.S. 544 (1993).

on actual speech by mandating the confiscation of a speaker's megaphone because it was a stolen good.²⁴⁷

Lastly, however, there is one exception to this distinction between incidental restriction of and incidental impact on actual speech. There are certain forms of conduct, not necessarily expressive themselves, that Scalia will protect as a kind of extension of actual speech. This category comprises conduct that is "intertwined" or "intermingled" with actual speech or is, in Scalia's words, "an essential concomitant of effective speech."²⁴⁸ He views marching and picketing as examples. Logically, the regulation of those activities is closer to the model of mere incidental impact than incidental restriction. The regulation formally operates upon nonexpressive conduct²⁴⁹ but, through a chain of causation, the interference with that conduct has an incidental impact on actual speech because the conduct is used to engage in speech. Because actual speech and that adjunct conduct are so intimately connected as to virtually comprise a single subject of regulation, however, Scalia will treat a general regulation of conduct like marching as an incidental restriction of any accompanying actual speech, even though the regulation does not formally operate upon the actual speech itself.²⁵⁰

B. FROM *HURLEY* TO *BOY SCOUTS*

These complexities of Scalia's *Smith* jurisprudence—or, more broadly, his First Amendment jurisprudence—offer a theory for harmonizing Scalia's vote in at least the *Hurley* case with his votes in *Smith*, *Barnes*, and similar cases. The complexities could arguably also provide a way to harmonize his vote in *Boy Scouts* as well. Applying those complexities to either *Hurley* or *Boy Scouts* requires a good deal of inference and extrapolation, processes that inject some uncertainty into the analysis. In the end, though, questions of material fact that remained at issue in *Boy Scouts* seemingly preclude resort to this theory as an explanation of Scalia's vote in that case, even though it works as an explanation of his vote in *Hurley*.

247. *See id.* at 549–53.

248. *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 624 (D.C. Cir. 1983) (Scalia, J., dissenting).

249. This, at least, is Scalia's understanding of the expressive nature of marching and picketing. *See id.*

250. As Scalia has explained, this exception is really just an extension of the notion that one act may simultaneously exhibit both expressive and nonexpressive aspects. The difference is that instead of one act displaying those aspects, this scenario involves two separate acts, one presenting the expressive aspect and the other presenting the nonexpressive aspect, but both acts are so intertwined as to justify treating them as if they were one act with two aspects.

1. Extrapolating to Incidental Compulsion

In order to apply Justice Scalia's First Amendment framework to *Hurley* and *Boy Scouts*, it is necessary first to address one additional complication. That framework must be slightly re-engineered because those cases involved compulsion, not restriction, of communication. In *Barnes* and *Smith*, for example, the cases involved general laws prohibiting conduct that the challengers wished to engage in as a form of expression. The same was true, as well, for *O'Brien*, *Saia*, *Schneider*, and through a chain of causation, *Arcara*. *Hurley* and *Boy Scouts*, on the other hand, involved laws allegedly compelling communication via mandated association. An important preliminary question, then, is how Scalia's framework translates to the context of compulsory communication.

Although it involved religion rather than communication, Scalia's majority opinion in *Smith* provides some basis for extrapolating an answer to this question. As noted above, *Smith* did not involve an instance of compelled conduct, but Scalia nevertheless touched on that issue in dicta in outlining his general approach to religious freedom claims. In at least three passages of his *Smith* opinion, Scalia referred to the compulsion of conduct forbidden by one's religion, and he did so in such a way as to imply that he regarded compulsion and restriction as legally symmetrical issues.²⁵¹ First, he pointed out that "the 'exercise of religion' often involves . . . the performance of (or abstention from) physical acts."²⁵² Then, he characterized the challengers' argument as an assertion that "'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that *requires* (or forbids) the performance of an act that his religious belief *forbids* (or requires)."²⁵³ Lastly, he rejected that proposition with a similarly symmetrical articulation: "[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).'"²⁵⁴

Although Scalia's mirror-image language in *Smith* suggests a symmetry between compulsion and restraint in the First Amendment context, *Smith* does not necessarily speak to the more specific question whether Scalia's differential treatment of impermissible targeting, incidental restric-

251. *But see* Tribe, *supra* note 7, at 641 ("[O]bservers often tend to imagine that certain features of the legal landscape, particularly the landscape of rights, are more symmetrical than they really are.").

252. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).

253. *Id.* at 878 (emphasis added).

254. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (emphasis added).

tion, and incidental impact applies symmetrically to compulsion of speech or expression in the same way it applies to restriction of speech or expression. Support for that proposition, however, comes from the very theoretical justification Scalia has given in support of the distinction between at least impermissible targeting and incidental restriction. For Scalia, the distinction rests on the text of the First Amendment itself.²⁵⁵ The text literally protects actual speech but only derivatively or inferentially protects expressive conduct. The same distinction between the textual freedom of speech and the derivative freedom of expression would seemingly apply not only to restraints on one or the other but also to compulsion of one or the other. The broader freedom of expression, as Scalia has explained, merits protection only against impermissible targeting, not against mere incidental restriction, because it is a nontextual, derivative First Amendment right. By extension, the same differential ought to apply to targeted compulsion and incidental compulsion of expressive conduct. Scalia's theory would, by extrapolation, support heightened scrutiny in the case of the former but not the latter. By further extrapolation from *Arcara*, one may assume that a law that only incidentally *impacted* an individual's desire not to express a message through either actual speech or conduct would not implicate the First Amendment at all.

Setting aside *Hurley* and *Boy Scouts* for present purposes, this differential treatment of targeted and incidental compulsion seems consistent with the Court's compulsory speech precedents, a number of which have applied strict scrutiny in the face of targeted compulsion. The anchor of this line of decisions, *West Virginia State Board of Education v. Barnette*,²⁵⁶ involved targeted compulsion of both actual speech and expressive conduct. There, the Court invalidated a state regulation requiring teachers and students in all publicly supported schools to recite the Pledge of Allegiance and to physically salute the American flag. In doing so, the regulation did not compel activity that sometimes happens to have expressive aspects; it compelled activity in a desire to force teachers and students to express a state-approved message. In *Wooley v. Maynard*,²⁵⁷ the Court likewise invalidated a New Hampshire law making it a crime to obscure the words "Live Free or Die" that were printed on all state-issued automobile license plates. Setting aside the inadequate response that objectors could simply forego vehicle registration and driving, the law, in combination with the requirement that cars display the state-designed license plate, amounted

255. See *supra* Part IV-A.

256. 319 U.S. 624 (1943).

257. 430 U.S. 705 (1977).

to a targeted compulsion of actual speech. As with *Barnette*, the law singled out speech or expressive conduct for special compulsion precisely because of its communicative aspects.²⁵⁸ Neither case represented an attempt by the government to contend with a Cubist dilemma. The activities were not compelled for some reason unrelated to the message expressed by the activity.

Set against the targeted compulsion of communication in *Barnette* and *Wooley* would be examples of incidental compulsion of communication. Although difficult to hypothesize, incidental compulsion of communication arises when the government compels an activity that may have an expressive aspect but compels the activity for some nonexpressive reason. Perhaps the best examples involve governmental compulsion of speech, writing, or activity not strictly because of its communicative aspect but because it constitutes a legal act that triggers applicability of a particular legal rule. A witness who is subpoenaed to testify in open court, for example, is compelled to raise his or her right hand (expressive conduct) and swear or affirm that his or her testimony will be truthful (speech). The point of the exercise is not so much to require the person to communicate a message but to require the performance of a legal act that formally triggers the application of perjury laws. Likewise, an attorney is required by law to sign all pleadings before filing them in court, in order to trigger the regime of sanctions for improper filings.²⁵⁹ The government may require an individual to sign a document as the legal act triggering the distribution of governmental benefits, subjecting the individual to legal constraint, or finalizing a change in legal status. The government requires an individual to sign a check or contract as a legal act validating the instrument and triggering application of a governing legal regime. Even a President-elect is required to take an oath of office as a legal act that effectively places the executive power of the United States in his or her hands. That these compulsory actions²⁶⁰ communicate a name, promise, or idea is secondary to their status as legal acts providing objective evidence that legal rules became applicable to certain transactions at certain moments in time. One would be hard-pressed to describe them as targeted compulsion of expression in the *Barnette* or *Wooley* sense. They better fit the model of incidental compulsion: requiring communication for reasons largely unrelated to their messages.

258. See *id.* at 713. See also *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

259. FED. R. CIV. PRO. 11.

260. As in *Wooley*, some of these are compulsory in the sense that they are preconditions for the invocation of legal rights or the receipt of legal benefits.

Scalia's First Amendment jurisprudence indicates by extrapolation, however, that he would differentiate between the incidental compulsion of actual speech and the incidental compulsion of mere expressive conduct, to the extent he would support heightened scrutiny of incidental compulsion at all. Such a distinction finds some basis in Scalia's jurisprudence. He has indicated that, as with incidental restriction of actual speech, incidental compulsion of actual speech triggers heightened scrutiny.²⁶¹ One may also readily infer from his opinions in cases like *Barnes* and *Smith*, in contrast, that he would be unwilling to apply heightened scrutiny based on the mere incidental compulsion of expressive conduct, but that inference flows obliquely from the nature of an incidental compulsion of expressive conduct and from Scalia's understanding of the proper role of the Court in First Amendment cases, as I shall explain.

The concept of incidental compulsion of expressive conduct should pose the same theoretical problem for Scalia that the concept of incidental restriction of expressive conduct poses. In addition to the purely textual argument, he has justified the refusal to apply heightened scrutiny to the incidental restriction of expressive conduct on the ground that such a narrowing interpretation of the First Amendment is necessary to avoid what might otherwise become a sweeping judicial authority to second-guess legislative choices. For Scalia, the problem has been that governmental attempts to prohibit virtually any activity might interfere with someone's desire to engage in that activity as a form of symbolic speech²⁶² or religious observance.²⁶³ Subjecting to heightened scrutiny every conduct regulation that incidentally restricted expressive or religious conduct would be, in his view, "courting anarchy."²⁶⁴ Challengers cannot reasonably demand that every incidental restriction of expressive or religious interests "pass normal First Amendment scrutiny, or even . . . that it be justified by an 'important

261. By joining Justice O'Connor's separate opinion in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 674–85 (1994), Justice Scalia adhered to his view that either the direct or incidental restriction of actual speech—in that case cable television programming—requires heightened scrutiny. In particular, Part II of her opinion, which he joined, applies heightened scrutiny based on the incidental compulsion of actual speech and cites *Schneider* in the process. *See id.* at 682–84.

262. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 579–80 (Scalia, J., concurring) ("[V]irtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition.")

263. *See Employment Div. v. Smith*, 494 U.S. 872, 888 (1990) (presuming that "every regulation of conduct" could interfere with someone's exercise of religion "[p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference'" (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (holding the Free Exercise Clause does not require religious exemption of Sabbatarians from state law requiring businesses to close on Sundays)).

264. *Id.*

or substantial' government interest."²⁶⁵ The nation, in Scalia's view, simply "cannot afford the luxury of deeming *presumptively invalid* . . . every regulation of conduct that does not protect an interest of the highest order"²⁶⁶ or even an interest that is "sufficiently important" to satisfy an intermediate form of scrutiny.²⁶⁷

This concern resonates in other areas of constitutional law. It is strongly reminiscent of the Court's justification for holding that the Equal Protection Clause does not forbid governmental action having only a racially disparate impact. Writing for a seven-person majority in *Washington v. Davis*,²⁶⁸ Justice White observed that a rule requiring heightened scrutiny only because laws have a racially disparate impact "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."²⁶⁹

One may question whether Scalia overstated the potential for incidental restriction²⁷⁰ or understated the importance of First Amendment freedoms. In both *Barnes* and *Smith*, nevertheless, he consistently articulated this concern for excessive judicial review as the justification for avoiding a doctrine of heightened scrutiny in cases presenting only the incidental restriction of expressive conduct or religious exercise. Rather than recognize "a private right to ignore generally applicable laws"²⁷¹ and allow each individual "to become a law unto himself,"²⁷² Scalia preferred to take the position that when "[t]he State is regulating conduct, not expression, . . . those

265. *Barnes*, 501 U.S. at 576–77.

266. *Smith*, 494 U.S. at 888.

267. *Barnes*, 501 U.S. at 577. See also Rubinfeld, *supra* note 13, at 771 ("If . . . *O'Brien* really called for judicial superlegislative review of whether a particular [conduct regulation] serves its policy objectives well enough to be sustained, then the *O'Brien* test would be something like *Lochner v. New York* all over again.")

268. *Washington v. Davis*, 426 U.S. 229 (1976).

269. *Id.* at 248.

270. Indeed, Scalia acknowledged in *Barnes* that dancing might not qualify as expressive under the Court's prior ruling in *Dallas v. Stanglin*, 490 U.S. 19 (1989). *Barnes*, 501 U.S. at 577 n.4. There, the Court (in a majority opinion joined by Scalia) adopted the view that it could distinguish conduct that was and was not *sufficiently* expressive to justify First Amendment protection. *Id.* at 25 ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.")

271. *Employment Div. v. Smith*, 494 U.S. 872, 885–86 (1990).

272. *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden.”²⁷³

The same considerations apply to the incidental *compulsion* of expressive conduct. The reason is the very nature of expressive conduct. Compliance with virtually any law compelling an individual to perform an act could be characterized as incidentally compelling the symbolic expression either of support for the law or at the very least of agreement with the proposition that the burdens of compliance with the law are insufficient to justify a resort to civil disobedience or revolution. Just as in the case of incidental restrictions of expressive conduct, “an apparently limitless variety of conduct” could potentially be labeled as compulsory expression whenever the actor felt compelled to express a view by (or witnesses to the conduct might objectively infer a message²⁷⁴ from) the actor’s acquiescence in the prescribed conduct.²⁷⁵ Although *conventionally* expressive conduct might be exempted,²⁷⁶ a general rule of heightened scrutiny based on nothing more than incidental compulsion of conduct that might be regarded by some as expressive would contradict Scalia’s desire to avoid a sweeping judicial second-guessing of legislative choices. Of course, if a law compelled even nonexpressive conduct that was in some way “a necessary concomitant” of silence, Scalia might treat regulation of the conduct as an incidental compulsion of actual speech, if any such conduct exists.

2. Applying the Approach to *Hurley* and *Boy Scouts*

This extrapolated compulsory-speech version of Scalia’s First Amendment framework can be used to analyze the claims of compulsory speech or expression in *Hurley* and *Boy Scouts*, as well as Scalia’s vote in each case. While his vote in *Hurley* seems consistent with the compulsory speech version of his framework, his vote in *Boy Scouts* is more questionable.

273. *Barnes*, 501 U.S. at 580–81.

274. *Cf. Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (holding that in a case of targeted restriction, the communicative aspect of displaying a flag upside-down with a peace symbol depends on the context, such as then-recent shootings at Kent State and U.S. military involvement in Cambodia).

275. *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 625 n.16 (D.C. Cir. 1983) (Scalia, J., dissenting) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968))).

276. *Compare, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000) (emphasizing not the presence of Dale generally as a scout leader but his presence “in an assistant scoutmaster’s uniform”), with *Schacht v. United States*, 398 U.S. 58 (1970) (holding wearing of military uniform in dramatic presentation criticizing Vietnam War to be symbolic speech).

In a number of respects, *Hurley* was similar to *Boy Scouts*. In *Hurley*, the Court invalidated Massachusetts' public accommodation law as applied to require the private organizers of Boston's St. Patrick's Day parade to include a unit of self-identified lesbian, gay, and bisexual Irish-Americans. The Massachusetts Supreme Judicial Court, like the New Jersey Supreme Court, found the parade to be a "public accommodation" and held that the organizers' exclusion of the gay contingent unlawfully discriminated on the basis of sexual orientation. As in *Boy Scouts*, the parade organizers challenged the enforcement of the public accommodation law against them on the ground that it interfered with their expression. Lastly, the Court sustained the First Amendment challenge because the law incidentally compelled the parade organizers to communicate a message.²⁷⁷

There were, however, differences between *Hurley* and *Boy Scouts* that distinguish the two cases within Scalia's extrapolated First Amendment framework. Of perhaps greatest significance were the respective modes of alleged compulsory communication. In *Hurley*, the mode of communication was actual speech embedded in a parade setting. The state court's ruling had, in the Court words, required "the admission of [the gay group] as its own parade unit carrying its own banner."²⁷⁸ This mode of communication is relevant in two ways under Scalia's framework. First, it involved actual speech, emblazoned on the banner,²⁷⁹ and second, it involved conduct that is "an essential concomitant" of the parade organizers' actual speech—marching. In light of those factors, even incidental compulsion of communication would have been sufficient under Scalia's framework to trigger some form of heightened scrutiny because both factors implicate either actual speech or conduct Scalia assimilates to actual speech.

The mode of compulsory communication in *Boy Scouts* was quite different. The centerpiece of the Court's decision was its determination that James Dale's "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²⁸⁰ How Dale's "forced inclusion"²⁸¹ would have produced compulsory communication was not made entirely clear in the ma-

277. See *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 560–66 (1995). Nowhere in the *Hurley* opinion did the Court suggest that the public-accommodation law presented a case of targeted compulsion.

278. *Id.* at 572.

279. See Rubinfeld, *supra* note 13, at 817 n.113 (relying on this first factor in distinguishing *Hurley* from *Boy Scouts*).

280. *Boy Scouts*, 530 U.S. at 653.

281. *Id.* at 656.

jority opinion. But in applying Scalia's framework it would be important to figure out whether Dale's presence would somehow compel the Boy Scouts to engage in actual speech or mere expressive conduct. If only the latter were at issue, Scalia's extrapolated framework would require the Boy Scouts to establish *targeted* compulsion of expressive conduct. The Boy Scouts would have to show that the law, like the mandatory flag salute in *Barnette*, compelled conduct precisely because it expressed a particular message.

Although the Court did not fully describe how the forced inclusion of Dale would compel the Boy Scouts to engage in communication, it indicated that the conclusion turned on the public (or notorious) character of Dale's sexual identity. In the key passage of the opinion,²⁸² the majority pointed to Dale's prominence in the community, his open and honest self-identification as gay, and his standing as a supposed "gay rights activist"²⁸³ as material to the determination that his presence would somehow compel the Boy Scouts to communicate its moral approval of gay sexuality. The majority opinion seemed to indicate that the result would have been different had Dale been more guarded or discreet about his sexuality.²⁸⁴ In quoting an illustrative passage from *Hurley*, the majority seemed to embrace the idea that Dale himself, as a result of his public reputation, would iconically "suggest" or "bear witness to" the viewpoint that gay sexuality was morally right.²⁸⁵

This feature of the majority opinion might be explained by a simple misattribution theory, in which case one might be able to conclude that

282. See *id.* at 653–54 (determining that the state-mandated inclusion of Dale would effectively compel the Boy Scouts to send a message).

283. *Id.* at 653 ("Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.' . . . Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist."). Accord *id.* at 644 (emphasizing Dale's standing as "an avowed homosexual and gay rights activist"); *id.* at 655–56 (describing Dale with same phrases).

284. *Id.* at 653 (disclaiming the notion that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." (emphasis added)). Read in context, the sentence seemed to distinguish merely being gay from being avowedly gay and politically active.

The District of Columbia Commission on Human Rights relied on precisely this distinction in holding the District's public accommodation applicable to the Boy Scouts' expulsion of two gay men who were, in fact, more discreet about their sexual orientation. See *Pool v. Boy Scouts of Am.*, Nos. 93-030-(PA) & 93-031-(PA), at 55–62 (D.C. Comm'n on Human Rights, Jun. 21, 2001), available at Gay & Lesbian Activists Alliance, Inc., <http://www.glaa.org/archive/2001/poolandgellerruling0621.pdf> (visited June 12, 2002), and *Discrimination in the BSA*, http://www.bsa-discrimination.org/Gays-Top/PoolGeller-Top/Pool_Geller_Decision.pdf (visited Aug. 3, 2002), *rev'd sub nom.* *Boys Scouts of Am. v. D.C. Comm'n on Hum. Rts.*, 809 A.2d 1192 (D.C. 2002).

285. *Boy Scouts*, 530 U.S. at 654 (quoting *Hurley*, 515 U.S. at 574–75).

Dale's legally mandated inclusion incidentally compelled actual speech. In some contexts, the Court has concluded that an enterprise's First Amendment interests were impaired where the government required the enterprise to associate with others in a way that might lead the public to misattribute the speech of those others to the enterprise itself. For instance, the Court has accepted that kind of theory where the government has attempted to require either a newspaper to publish a reply from a politician whom the newspaper had criticized²⁸⁶ or a public utility to include a public interest group's messages in a newsletter that the public utility disseminated to its customers along with the monthly electric bill.²⁸⁷ On the other hand, the Court has rejected the theory where the government has required either a cable television operator to deliver the content of local broadcast stations²⁸⁸ or a shopping mall to permit public interest groups to solicit customers on its premises.²⁸⁹

In the *Boy Scouts* opinion, however, the majority implicitly disclaimed at least this version of a misattribution theory. The opinion did not rest on the theory that state-mandated inclusion of Dale might have confused people by leading them to mistakenly attribute Dale's *off-duty* college activities, including his own actual speech, to the Boy Scouts. Such a theory would have been difficult to employ in the case because the majority tacitly acknowledged that the Boy Scouts would not revoke the membership of straight scout leaders merely because they supported gay rights or even expressly advocated that viewpoint through activism outside their capacity as scout leaders.²⁹⁰ Moreover, to the extent *either* a straight or gay scout leader actually advocated the morality of gay sexuality in his capacity as a scout leader, the organization could remove him,²⁹¹ notwithstanding the state public-accommodations law.²⁹² So the majority opinion must have

286. *Miami Herald Publ'g Co v. Tornillo*, 418 U.S. 241, 254-58 (1974).

287. *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986).

288. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994). Scalia, however, dissented in this case.

289. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

290. At most, the majority suggested that the evidence supported the Boy Scouts' assertion that it would remove a straight scout leader who advocated the morality of same-sex intercourse *to youth members of the Boy Scouts*. 530 U.S. at 655 n.1. One can readily imagine, however, a scout leader who refrained from that "on-duty" advocacy yet in his "off-duty" life had become a well-known gay-rights activist through involvement in an organization such as Parents, Family, and Friends of Lesbians and Gays (PFLAG).

291. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 n.1 (2000).

292. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) (noting that despite requiring the admission of women to Jaycees clubs, Minnesota's public accommodations law "requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing

rested on more than the simple notion that all “off-duty” speech of a scout leader may be treated as the official speech of the Boy Scouts for First Amendment purposes, or might be reasonably misattributed to the organization by members of the community. That avenue for discerning an incidental compulsion of actual speech was precluded by the facts of the case and implicitly disavowed by the Court.

Dale’s off-duty advocacy seems to have been relevant for a different reason. His advocacy—when combined with his public self-identification as gay—would allow people who were familiar with him to infer perhaps reasonably (even if mistakenly) that Dale not only believed same-sex intercourse to be morally legitimate but even engaged in the conduct himself. In addition, the fact that Dale had gained some measure of prominence in the community through his position as head of a gay student group, his participation in the seminar addressing the needs of gay youths, and the publicity he received in the Newark newspaper as a result made it likely that many people in his hometown would be sufficiently aware of the facts to draw those conclusions. The Newark article itself had paraphrased him as saying that in self-identifying as gay, “he wasn’t *just* seeking sexual experiences,”²⁹³ supporting a negative inference that doing so was *part* of the reason he had self-identified. Any number of scouts, parents, and members of the community could fairly infer that Dale had engaged in same-sex intercourse, which, according to the Boy Scouts, violated the Scout Oath and the Scout Law.

This widespread knowledge (or fair assumption), in the majority’s implicit view, made it problematic for New Jersey to forbid Dale’s exclusion from the Boy Scouts. What made the Boy Scouts an expressive association in the first place was its mission of “helping to instill values in young people.”²⁹⁴ Carrying out that mission was the job of scout leaders, like Dale,

members.”). Similarly, the New Jersey law protected individuals against discrimination because of their sexual orientation or expression of their own sexual identity, but it did not protect individuals from discrimination because of their political views on gay rights or any other subject. See N.J. STAT. ANN. § 10:5-4 (West 2001) (prohibiting discrimination based on “race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex”). It would have been inappropriate for *the Boy Scouts* majority to place such an extravagant interpretation on the New Jersey statute absent any indication that New Jersey courts would interpret the law in that manner. See, e.g., *Romer v. Evans*, 517 U.S. 620, 630 (1996) (noting broad possible interpretation of challenged state measure but declining to rest decision on that interpretation absent more guidance from state courts). See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

293. Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, NEWARK STAR-LEDGER, July 8, 1990, at 517, reprinted in Joint Appendix at 517, *Boy Scouts* (No. 99-699) (emphasis added).

294. *Boy Scouts*, 530 U.S. at 649 (quoting mission statement). See *id.* at 650 (“It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”).

who were supposed to inculcate values in their youthful charges “both expressly and *by example*.”²⁹⁵ Dale could hardly teach by example that “homosexual conduct” was morally perverse and filthy, as the organization maintained, if Dale himself were widely believed to engage in it. Whether Dale actually did so or not was almost immaterial. That he was widely assumed to do so meant that he could not serve as the kind of dystopian exemplar of gender-rigidified heterosexual mating that the Boy Scouts desired in its role models.

Although that theory seems to best explicate the majority’s finding of compulsory communication, it poses a major obstacle to the application of heightened scrutiny under Scalia’s extrapolated framework. If the New Jersey public-accommodation law incidentally compelled the Boy Scouts to communicate because it forced the organization to install as a scout leader an individual who had become a living example of the moral propriety of gay sexuality, then the New Jersey public accommodation law incidentally compelled the Boy Scouts to engage in only *expressive conduct*, not actual speech. The law might ultimately have the effect of practically inducing the Boy Scouts to issue an express disclaimer, but the actual legal coercion of the law itself would not, under this theory, have compelled the organization to speak under threat of court sanction. All the Boy Scouts would have been compelled to do under threat of contempt would have been to engage in the expressive conduct of installing Dale as a scout leader. Whether any resulting practical pressure would lead the Boy Scouts to issue an express disclaimer is more akin to the kind of incidental impact on actual speech at issue in *Arcara*.²⁹⁶ And *neither* the incidental compulsion of mere expressive conduct *nor* an incidental impact on actual speech would have been sufficient under Scalia’s extrapolated framework to trigger any First Amendment scrutiny at all.

It might be possible to argue, in the alternative, that state-mandated inclusion of Dale as a scout leader would interfere with *express* inculcation of antigay beliefs, thus implicating actual speech. It seems plausible that if a law requires an organization to employ as an express advocate an individual whose own life contradicts the message he is charged with advocating, the law arguably frustrates the full expression of the organization’s desired message by saddling it with an advocate who lacks sufficient personal

295. *Id.* (emphasis added).

296. *See also* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (holding implicitly that law’s creation of conditions giving party a nonlegal incentive to issue an express disavowal of other people’s speech does not itself establish compulsory speech). Professor Tribe would apparently now disagree. *See generally* Tribe, *supra* note 7.

credibility to make the advocacy effective. In that circumstance, it might be possible to find an incidental restriction of actual speech, although it is not clear that merely impairing a speaker's credibility is more than a mere incidental impact on actual speech under *Arcara*.

At any rate, the Court in *Boy Scouts*, including Justice Scalia, was precluded by the procedural posture of the case from pursuing that line of analysis in search of either an incidental compulsion or an incidental restriction of actual speech. The Court correctly observed that *in general* the Boy Scouts sought to instill values by having adult members "inculcate" those values "both expressly and by example."²⁹⁷ As to the inculcation of the specific antigay propaganda that was relevant to the case, however, the Court did *not* find that the Boy Scouts taught this belief expressly. Rather, the procedural posture of the case forced the Court to concede, implicitly, that its resolution of the First Amendment claim was constrained by the allegation, supported by material evidence, that "the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach *only* by example"²⁹⁸ in the particular context of gay sexuality.

The procedural posture was relevant because at the time of the appeals that culminated in the Court's review, the case had reached only the summary judgment stage. There had been no trial to resolve any disputed questions of material fact, and on this question of fact, there was a genuine dispute. Although the Boy Scouts adverted to two published statements that ambiguously anticipated at least some measure of express dialogue between scout leaders and youths about sexuality in general,²⁹⁹ Dale offered a

297. *Boy Scouts*, 530 U.S. at 649–50.

298. *Id.* at 655 (emphasis added).

299. See Joint Appendix at 211, *Boy Scouts* (No. 99-699) (reprinting portions of the Scoutmaster Handbook). The Scoutmaster Handbook notes that [y]our religious leaders can give you moral guidance [about sexuality]. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know. . . . If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster. *Id.* The Handbook later goes on to note that "[o]lder Scouts are concerned about sex and think about girls much of the time. Accept all youth as they are. Your acceptance will reassure them that they are 'normal.' . . . Be accepting of their concerns about sex. Be very open and clear when talking with them." *Id.* at 248.

Although the Boy Scouts complained that the New Jersey Supreme Court "failed to note the references in the Boy Scout Handbook to sexual responsibility, marriage, and fatherhood," Brief for Petitioners at 17, *Boy Scouts* (No. 99-699), the passage containing those references has as its clear, overriding objective the prevention of teenage pregnancy and sexually transmitted diseases. See Joint Appendix at 210–11, *Boy Scouts* (No. 99-699) (discussing problems teenage pregnancy causes for both women and children and discussing risk of sexually transmitted diseases). Furthermore, as the New Jersey Supreme Court actually *did* note, see *Dale*, 734 A.2d at 1203, the reference in that passage to sexual morality was carefully qualified, immediately converted into a secularized concern for psychological well-being, and ultimately presented simply as sage practical advice for living. See Joint Ap-

more specific, Boy Scouts directive that “boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.”³⁰⁰ Dale also presented admissions from scouting officials that opposition to gay sexuality was not “contained in *explicit* language in any document that is disseminated to Scouts,”³⁰¹ and that in Dale’s own Boy Scouts council, scout leaders did not “engage in sexual instruction or counseling,” apart from a program designed to educate scouts about child abuse.³⁰² Indeed, the Boy Scouts itself went so far as to concede that “[o]fficial Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct”³⁰³ and that in general scout leaders “teach by example as much or more than they teach by proscription.”³⁰⁴ Dale’s concrete evidence suggested that scout leaders rarely, if ever, addressed the morality of gay sexuality in any way other than by providing a living heterosexual example. Although the majority opinion grumbled that the Boy Scouts “dispute[d] with contrary evidence” the proposition that it discouraged explicit instruction as to sexual morality,³⁰⁵ that “contrary evidence” at best raised a genuine issue of material fact and, quite arguably, was not substantial enough to meet the organization’s burden of production in resisting summary judgment on that point. The majority actually found the Boy Scouts to have made explicit statements about gay sexuality only in a few internal memoranda and “in prior litigation.”³⁰⁶ The majority did not find (and could not have found) as a matter of binding fact at that stage of the litigation that the Boy Scouts *expressly* inculcated a particular moral view of gay sexuality. Adjudication of the Boy Scouts’ First Amendment claim could not have rested on a resolution of that open fact question about which there had been no trial,³⁰⁷ and that procedural constraint precluded a

pendix at 248, *Boy Scouts* (No. 99-699) (“For the followers of most religions, sex should take place only between married couples. To do otherwise may cause feelings of guilt and loss. Abstinence until marriage is a very wise course of action.” (emphasis added)) (reprinting portion of Scout Handbook).

300. Joint Appendix at 668, *Boy Scouts* (No. 99-699) (reprinting affidavit quoting portion of Scoutmastership Fundamentals).

301. *Id.* at 691 (reprinting portions of deposition of Boy Scouts official) (emphasis added). See also *id.* 697 (admitting that it was not “an *explicit* aim of the Boy Scouts to discourage homosexuality” (emphasis added)).

302. *Id.* at 758 (reprinting portions of deposition of Boy Scouts official who informed Dale of his expulsion).

303. Brief for Petitioners at 5, *Boy Scouts* (No. 99-699).

304. *Id.* at 3–4.

305. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

306. See *id.* at 652 (citing *Curran v. Mount Diablo Council of Boy Scouts of Am.*, No. C-365529 (Cal. Super. Ct. July 25, 1991); 29 Cal. Rptr. 2d 580 (Ct. App. 1994); 952 P.2d 218 (Cal. 1998)).

307. Indeed, to the extent the fact was relevant, it was relevant to the Boy Scouts’ proof of its defense of unconstitutionality. As such, the Boy Scouts, not Dale, would have borne the initial burden of proof on the question. In order to prevail at summary judgment, the Boy Scouts would have had to es-

theory that by interfering with express inculcation of antigay beliefs, New Jersey's public-accommodation law incidentally restricted actual speech.³⁰⁸

One last variation on this approach deserves mention, and it involves the special case of conduct that is "intertwined" with or is "an essential concomitant of effective" speech. Scalia has explained that even the incidental restriction—and, by extrapolation, the incidental compulsion—of this conduct will trigger heightened scrutiny because of the intimate connection between the conduct and the actual speech with which it is intertwined. Relying on this nuance of his First Amendment framework, one might argue that association, like marching and picketing, is such conduct. After all, *Roberts* recognized expressive association as "an indispensable means of preserving" other First Amendment freedoms, including speech.³⁰⁹ On this view, even the incidental compulsion of expressive association might be thought to trigger heightened scrutiny because, if one accepts the premise, it is an essential concomitant of effective speech, or in this instance abstinence from actual speech.

How that sort of argument would work under Scalia's extrapolated framework is unclear because it could be formulated in one of two ways. First, the argument might fail in *Boy Scouts* because, as just explained, the particular compelled association in that case was not intertwined with—or necessarily resulted in the compulsion of—actual speech. On the other hand, the argument could be cast more abstractly, so that Scalia might recognize that expressive association, whether intertwined with actual speech in the specific case or not, is deemed *in general* to be a concomitant of effective actual speech and is treated like actual speech regardless of the circumstances of a particular case. His *Watt* opinion can be read to support either interpretation, although it leaned toward the former, situational analysis.³¹⁰ The latter version, moreover, would arguably be inconsistent

establish that no reasonable juror could find that the organization preferred scout leaders to teach sexual morality only by example. They could not have met that high burden of proof on the record before the Court.

308. Nor as Dale's case had been litigated could the Court have based a similar conclusion on the Boy Scouts internal memoranda. The state-mandated inclusion of Dale as a low-level scoutmaster would do little to impair the credibility of the executives who had distributed those memoranda.

309. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

310. See *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 623 (D.C. Cir. 1983). Here, Scalia noted:

I would be content to consign marching and picketing, as the principal dissent suggests, to a category of traditionally expressive conduct *which itself qualifies as speech*, and thus does not require a showing of expression-suppressing intent. I do not think that exception is necessary,

with the major thrust of the majority opinion in *Boy Scouts*, which revolved around the determination that the compelled association *on the facts of that case* significantly affected the Boy Scouts' expression.

In sum, Scalia's willingness to apply heightened scrutiny in the face of incidental restrictions or compulsions of actual speech, as opposed to expressive conduct, can fully explain his vote to invalidate the enforcement of the public-accommodation law at issue in *Hurley*, but it does not seem capable of explaining his vote to do the same thing on the different facts of the *Boy Scouts* case. That the state action should have been invalidated in *Hurley* but upheld in *Boy Scouts* because the former involved actual speech while the latter involved only expressive conduct may strike some as highly formalistic. If so, however, it is a result of Scalia's own formalistic distinction, based on the text of the First Amendment, between actual speech and expressive conduct.

C. INCIDENTAL COMPULSION OF EXPRESSIVE ASSOCIATION

There remains one final extrapolation from Scalia's indulgence of heightened scrutiny based on mere incidental restriction or compulsion of actual speech. This extrapolation takes his distinction in the communication context between actual speech and expressive conduct and generalizes the distinction to other freedoms protected by the First Amendment. If an analogous distinction were somehow extended to expressive association, it might provide a final theory for harmonizing Scalia's vote in *Boy Scouts* with his *Smith* jurisprudence. But given the nature of the multiple extrapolations necessary, the analysis of this theory borders on the speculative.

If Scalia understands his *Smith* jurisprudence as attempting to articulate a general theory of the First Amendment, it may be possible to import the speech-expression distinction into other First Amendment rights. If possible, the concept analogous to actual speech would, by extension, merit protection against even incidental restriction or compulsion while the concept analogous to expressive conduct would merit protection against only targeted restriction or compulsion.

The freedom of religion illustrates the kind of translation required and, significantly, provides evidence that Scalia has contemplated a generalization of the speech-expression distinction. *Smith* contains evidence of a dis-

however, to explain the cases. The marching and picketing holdings represent *not conduct protected because it is in itself expressive, but rather what the cases and commentators call 'speech-plus'—conduct 'intertwined' or 'intermingled' with speech.*"
Id. (footnotes omitted and emphasis added).

inction between, on the one hand, religious “belief and profession” and, on the other hand, “the performance of (or abstention from) physical acts.”³¹¹ In discussing the former, Scalia explained that

[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief [or] punish the expression of religious doctrines it believes to be false.³¹²

In support of these propositions, he cited two relevant cases, *Torcaso v. Watkins*,³¹³ which involved targeted compulsion of religious profession, and *United States v. Ballard*,³¹⁴ which involved the incidental restriction of religious profession. In each case, the Court applied a heightened form of scrutiny and invalidated the challenged law or governmental action. *Ballard*, in particular, is significant in demonstrating Scalia’s recognition that the mere incidental restriction of religious profession triggers heightened scrutiny,³¹⁵ even as he proceeded in his *Smith* opinion to require a showing of specific targeting in order to trigger heightened scrutiny where only religious *conduct* was implicated. This example illustrates Scalia’s recognition of a profession-practice distinction in the religion context that seems to parallel the speech-expression distinction in the speech context.

This recognition of a more generalized distinction between what might be called intrinsic and derivative First Amendment rights raises the possibility that Scalia might also recognize some sort of analogous distinction with respect to freedom of association. Analytically, however, it is difficult to conceptualize a parallel distinction applicable to association. In the cases of both speech and religion, the derivative value that requires a showing of specific targeting in order to merit heightened scrutiny is *conduct*—expressive conduct or religious practice. Likewise, the intrinsic value that receives protection against even incidental restriction is, in essence, pure speech—oral or written communication of secular or religious ideas. To

311. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

312. *Id.* (citations and internal quotation marks omitted).

313. 367 U.S. 488 (1961).

314. 322 U.S. 78 (1944).

315. *Ballard* involved application of a generally applicable mail-fraud statute to an instance of religious solicitation. There was no allegation that the law specifically targeted religious beliefs either on its face or in its operation. The statute simply targeted mail solicitations containing fraudulent factual claims. While not invalidating the statute generally, the Court in *Ballard* held that the government could not enforce the statute against religiously inspired factual claims, even if those claims were highly dubious.

extend a similar distinction to expressive association presumably would require identification of some “intrinsic” form of association that somehow concerns belief or identity distinct from physical conduct. The idea of *affiliation* is perhaps the only concrete concept that seems analogous—affiliation in terms of official membership in a group as an expression of one’s identity but lacking any accompanying physical conduct.³¹⁶ Recognizing an affiliation-association distinction might have limited relevance in *Boy Scouts* by providing heightened scrutiny with respect to the incidental compulsion of official membership for Dale but presumably not as to the incidental compulsion of his inclusion as an active scout leader performing the duties of the position, which are matters of conduct.

One might propose a distinction between expressive and nonexpressive association, treating the former like actual speech and the latter like expressive conduct. Such a distinction could provide one way of making sense of the assertion in the *Boy Scouts* majority opinion that the New Jersey civil rights law “directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection.”³¹⁷ But this interpretation of the sentence would not fit its literal language, for if nonexpressive association were analogized to expressive conduct in terms of a derivative category of partially protected First Amendment interests, one would not imply that only the associational rights at issue *in the case* enjoyed First Amendment protection. Besides, the Court has already established that there is no generalized constitutional freedom of association. Association is protected by the First Amendment only if it is expressive.

At any rate, recognition of some kind of intrinsic-derivative distinction in the association context would be inconsistent with Scalia’s articulated reason for recognizing one in the speech context: the text of the First Amendment. He regards actual speech as entitled to greater protection than expressive conduct because only the former is literally mentioned in the text of the First Amendment. Expressive association is not mentioned anywhere in the text of the First Amendment and in its very conception is merely an instrumental extension of the freedom of speech. Accordingly, it would seem impossible to make a textual argument supporting an analogy between speech and expressive association for purposes of recognizing

316. *Cf.* *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (holding religiously-affiliated university unlawfully discriminated against gay student group by denying tangible benefits to group but could not be held to have violated the law by withholding official university recognition).

317. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

some kind of intrinsic-derivative distinction within the latter, although the instrumental conceptualization of expressive association in its entirety seems readily analogous to the derivative character of expressive conduct alone.³¹⁸

While there are reasons to think that more is at work than text alone, association still seemingly cannot qualify for the level of protection afforded actual speech. It is true that Scalia seems not to have based his profession-practice distinction in the religion context on a textual footing. After all, the text of the First Amendment literally refers to the “free *exercise*” of religion, which seemingly includes religious conduct,³¹⁹ yet Scalia has treated only religious belief, profession, and identity as analogous to actual speech.³²⁰ He has treated religious conduct as entitled only to the kind of derivative protection he would extend to expressive conduct. The implication is that it is not the text that is defining the distinction but the difference between conduct, which poses potential social harms in need of regulation, and speech, which may perhaps be generally assumed not to.³²¹ Either way, association, with the exception of the narrow affiliation concept, seemingly cannot qualify for the protection afforded actual speech.

While the pursuit of an analogous distinction in the association context is perhaps an amusing intellectual puzzle, it seems not to promise much in the way of explaining the apparent inconsistency between Scalia’s vote in *Boy Scouts* and his *Smith* jurisprudence. Nor, given the open factual questions about the speaking duties of a scout leader, could Scalia have rested his vote on an incidental compulsion of actual speech in *Boy Scouts*. Consequently, the availability of heightened scrutiny in the case of such compulsions in Scalia’s *Smith* jurisprudence cannot provide a theory that explains his vote in *Boy Scouts*.³²²

318. *But compare* *Troxel v Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (arguing that nothing in the Constitution protects the right of parents to direct the upbringing of their children), *with id.* at 93 n.2 (describing freedom of intimate association as an “enumerated” right). *See also* Kmiec, *supra* note 75 at 671 (“Somebody will have to tell me when the associational rights bec[a]me enumerated—that is, textual.”); *supra*, Part II (describing disconnect between textualist approaches in Scalia’s opinions in *Smith* and *Barnes*).

319. *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 406 (10th ed. 1994) (defining the noun “exercise” as, among other things, “the act of bringing into play or realizing in *action*” (emphasis added)).

320. *See* *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

321. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (noting that “conduct must remain subject to regulation for the protection of society”).

322. As noted previously, Scalia’s *Smith* jurisprudence, as extrapolated, seems, at most, able to justify heightened scrutiny to the requirement that the Boy Scouts fit Dale with an official uniform, *see supra* note 276, and, possibly, register him as an approved, official member, *see supra* text accompanying note 316.

CONCLUSION

Justice Scalia's vote in *Boy Scouts* was not judicially straight. It cannot be harmonized with the general theory of the First Amendment that he has developed in his *Smith* jurisprudence. *Boy Scouts* did not present the kind of specific targeting of expression or expressive association that Scalia's jurisprudence has required, nor did the majority opinion convincingly distinguish *O'Brien*. The particular feature of Scalia's First Amendment jurisprudence that would permit application of heightened scrutiny on the basis of a mere incidental restriction or compulsion of actual speech also cannot explain his vote in *Boy Scouts*. The presence of a genuine issue of material fact as to whether Dale's Boy Scout troop ever expressly inculcated the national organization's antigay morality precluded Scalia from basing his vote on a determination that enforcement of the New Jersey civil rights law would incidentally restrict or compel actual speech. A detailed comparison of his *Smith* jurisprudence discloses no convincing theory under which Scalia could have consistently voted as he did in *Boy Scouts*, at least in the procedural posture in which the case was before him.

Recognition of Scalia's probable inconsistency has several possible implications. First, as a practical matter, it may help in formulating strategies for limiting the potentially destructive impact of *Boy Scouts*. One strategy, for example, might be to target the majority's disingenuous attempt to distinguish *O'Brien*, either in defending against additional attacks on civil rights laws or, more proactively, in widely borrowing that passage and attempting to extend it to cases involving incidental restriction or compulsion of expressive or religious conduct. To the extent that passage fails to distinguish *O'Brien*, the passage may be useful in putting pressure on Scalia's *Smith* jurisprudence in its original contexts. If the New Jersey statute in *Boy Scouts* "directly and immediately" affected First Amendment rights via incidental restriction or compulsion, the argument may be made that laws in many other contexts do as well. Did the law in *Smith* not "directly and immediately" regulate possession of drugs, including peyote? This strategy would exploit the self-interested reason judges avoid inconsistency in the first place: their inability to predict how a precedent might boomerang on its progenitor in future cases. By putting this kind of direct pressure on the centerpiece of Scalia's *Smith* jurisprudence, this strategy could increase the pressure on him to retreat from his vote in *Boy Scouts*, at least by limiting the case to its facts.

On the other hand, many critics—on both the left and the right—would be pleased if such a strategy resulted not in a retreat from *Boy Scouts*

but an abandonment of the *Smith* jurisprudence itself.³²³ If Scalia's vote in *Boy Scouts* represents a crack in his commitment to that jurisprudence, that crack could spread (or could be wedged wider by creative litigants) in future cases in such a way as to eventually cast significant doubt on the legitimacy of the *Smith* jurisprudence or perhaps even convince Scalia himself to reexamine it, although the latter seems unlikely. This view, however, rests on the assumption that Scalia's vote in *Boy Scouts* may reflect a genuine disillusionment with the *Smith* jurisprudence more broadly.

The vote might instead be read narrowly in ways that support a far less charitable characterization of Scalia's performance in the case. Specifically, it may be read as demonstrating that, in his view, certain cases so urgently demand a particular outcome that he is willing to stray from an established jurisprudence that he has deliberately and passionately developed for nearly two decades. This interpretation would become most clear and most troubling if it turns out that the First Amendment theory of *Boy Scouts* protects only those who discriminate on the basis of sexual orientation, a distinct possibility. Were that the case, it would suggest that Scalia's exceptional vote in *Boy Scouts* may have rested on his own moral condemnation of or personal animus toward lesbians and gays.³²⁴ If that is the case, Scalia will have breached his own admonition that it is "no business of the courts (as opposed to the political branches) to take sides in this culture war."³²⁵ He will have failed his own requirement of judicial self-restraint³²⁶ by having cast his vote in *Boy Scouts* as "an act, not of judicial judgment, but of political will."³²⁷

323. See generally, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

324. See, e.g., Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 106 (1996) ("A sensitive reading of Justice Scalia's dissent [in *Romer*] makes clear that he is far from neutral where homosexuality is concerned."). Scalia's very conceptualization of gay rights issues as involving a zero-sum "culture war," see *Romer v. Evans*, 517 U.S. 620, 652 (1996), displays his personal animosity. Cf. Patrick J. Buchanan, Address at the Republican National Convention (Aug. 17, 1992) ("There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as the Cold War itself, for this war is for the soul of America.") (transcript available at <http://www.cnn.com/ALLPOLITICS/1996/conventions/san.diego/facts/GOPspeeches.past/92.buchanan.shtml>); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). Cf. also Charlton Heston, *Winning the Cultural War*, Address at Harvard Law School (Feb. 16, 1999) (transcript available at http://www.law.harvard.edu/news/Charlton_Heston_speech.html).

325. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

326. *Id.* at 636 ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.").

327. *Id.* at 653.