# Reaching a New Balance in Freedom of Association: The Goods Approach

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Establishing a better balance in questions of discrimination by associations is an urgent task to realize a well-functioning, truly inclusive pluralist society. While associations continue to claim exceptions from anti-discrimination law, membership in voluntary private associations can provide access to goods that might considerably influence life chances. Restrictive membership policies may thus conflict with anti-discrimination efforts of the liberal democratic state. Upon critical examination, I find that neither the current U.S. Supreme Court approach that protects a group's explicit message, nor the alternative approach that would shield all predominantly expressive groups, adequately protects the important liberty, equality, and democracy interests at stake. I therefore propose a *goods approach* that develops a more sophisticated conceptualization of associational goods by devising three parameters to operationalize the harm caused by exclusion: their materiality, availability, and valence. This avoids the stark dichotomy between extensive protection and intrusive regulation of associations by introducing the option of decoupling goods from membership, thereby offering a new logic for balance that allows all citizens a sufficient set of opportunities while not unduly restricting associational freedom of expression.

Keywords: freedom of association, discrimination, membership, equality, first amendment, pluralism

We currently seem to be once more engaged in a renegotiation of the proper balance between individual and associational speech rights and the nondiscrimination interests of the liberal democratic state. In controversial decisions, the U.S. Supreme Court recently struck down limitations on political speech rights of corporations, and a "closely held for-profit" corporation successfully claimed religious exemption from general health care provision laws.[1] The Court appears split

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1. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014). For a critical analysis see, e.g., David Ciepley, "Neither

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on a case it heard at the end of 2017 about the rights of a baker to refuse a homosexual couple service on the basis of religious beliefs, with the decision in the case pending.[2]

In the complex arena of private voluntary associations, this struggle between, on the one hand, individual and group rights to expression and disagreement with societal norms, and on the other hand, the liberal democratic state's authority to ensure equal rights of public access for citizens has been fought particularly fiercely.[3] Especially so-called secondary associations, meaning the vast array of social, cultural, religious, political, and sports clubs that are neither intimately private nor very public and that require varying degrees of participation from their members, have proven to be a controversial category with respect to government anti-discrimination regulation. The case that rang in the renewed debate concerning expressive and discrimination rights in the associational sphere was *Boy Scouts of America v. Dale* in 2000. Here, the Court upheld a private voluntary association's right to expel a gay scoutmaster from its ranks because of his sexual orientation—a decision that sparked nationwide controversy and led to mass exodus from the Boy Scouts.[4] *Dale* in this sense marked the departure from earlier decisions that had tended to protect the state's anti-discrimination interests over the expressive rights of associations.[5]

Freedom of association is well understood to be one of the main pillars of liberal democracy. Without a robust freedom to associate with whom one likes, freedom of expression, of opinion, of religion, and other fundamental liberties are seriously threatened. Moreover, voluntary associations promise to allow citizens

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Persons nor Associations," *Journal of Law and Courts* 1 (2013): 221–45; Ira Lupu "Hobby Lobby and the Dubious Enterprise of Religious Exemptions," *Harvard Journal of Law and Gender* 38 (2015): 35–102.

2. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111.

3. The term "association" is of course an umbrella description for very disparate groups, ranging from the family to large centralized lobby organizations that differ on a number of dimensions, such as purpose, size, hierarchy, cohesion, and nature of activity. In the following, the terms *association*, *organization*, *club*, and *grou*p will be used not as terms of art but interchangeably. The present article concentrates on so-called *secondary* associations as distinguished from *primary* intimate groups and *tertiary* quasi-public organizations. For more on this taxonomy, see Robert Putnam, *Bowling Alone* (New York: Simon & Schuster, 2000), 48–53; also Amy Gutmann, "Freedom of Association: An Introductory Essay," in *Freedom of Association* (Princeton, N.J.: Princeton University Press, 1998), 3–32, at 10.

4. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), at http://scoutingnewsroom.org/wp-content/uploads/2015/05/DR-GATES-REMARKS.pdf.

5. Notably *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *New York State Club Association v. New York City*, 487 U.S. 1 (1988).

to form opinions sheltered from majoritarian pressures, build self-esteem, and stave off threats of anomie in what can seem like an increasingly dispersed mass society.[6] Even short of understanding associations as potential "panacea for all the main illnesses of modern society,"[7] it is clear that finding and protecting the right balance between associational rights and egalitarian concerns is of crucial importance for the proper functioning of a pluralist liberal democracy.

However, as associations continue to claim exceptions from anti-discrimination law, we need clarification as to what kind of groups should have a right to discriminate, the extent of permissible discrimination, and the normative grounds upon which such discrimination rests. One crucial question in this context is whether associations should be allowed to restrict their membership, and thereby access to the opportunities they offer, on the basis of problematic criteria like race, gender, or sexual orientation. Membership in associations often comes with access to important goods, such as eligibility for jobs, the use of land, financial support, or skills and training that are also valuable outside the association. Discriminatory exclusion from membership can therefore undermine the state's efforts to guarantee fair access to opportunities and material resources required for meaningful freedom and democratic equality. Whenever associations pursue discriminatory policies, the liberal democratic state is faced with having to balance its commitment to equal citizenship and its promise of civic freedom.

The current U.S. legal approach and much of scholarly discussion seem to have largely settled on a defense of "*expressive* exclusion" via the so-called message approach, which allows membership discrimination only when it is part of a group's explicit message.[8] The only discussed alternative also focuses on expression as the sole grounds for protection, but proposes to decide on the basis of the primary nature of an association, so that groups whose activities are deemed to be predominantly expressive would be exempt from government intervention in membership policies while those that are considered primarily commercial would be regulated. As will be discussed, both approaches seek to shield associational expression over other features in order to enable democratic dissent.

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6. For example, see Robert Putnam, "Bowling Alone: America's Declining Social Capital," *Journal of Democracy* 6 (1995): 65–78, for a critical discussion of Simone Chambers and Jeffrey Kopstein, "Bad Civil Society," *Political Theory* 29 (2001): 837–65.

7. Yael Tamir, "Revisiting the Civic Sphere," in *Freedom of Association*, ed. Gutmann, 214–38, at 214 (see note 3 above).

8. Sonu Bedi, "Expressive Exclusion: A Defense," *Journal of Moral Philosophy* 7 (2010): 427–40, emphasis added.

In this article, I argue that both existing accounts fail to properly safeguard dissent and that the focus on expressive association falls short of achieving a good balance between protecting both the liberty and the equality interests at stake in associational membership questions. As an alternative, I propose what I term a goods-based account that builds on a more sophisticated theorization of the associational goods at stake in membership discrimination, and introduces the possibility of decoupling certain goods from membership to allow both access and the preservation of associational voice. In this way, I will argue, a new and better balance between egalitarian and liberty interests can be achieved, providing all citizens with a sufficient set of opportunities while not unduly restricting associational freedom of expression. To this end, the article will proceed as follows. In the first part, I outline the logic of the message approach and discuss how it fails, both conceptually and as it is applied by the courts, to adequately protect the associational ability to voice dissent, while also risking to neglect legitimate state goals of ensuring equal citizenship conditions. I also critique the alternative "primary nature" account on the same terms. In the second part, I propose a conceptualization of the associational goods at stake in membership exclusion and develop three parameters—namely materiality, availability, and valence—that help operationalize what these goods are and what harm exclusion from them causes. On the basis of this conceptualization, I discuss when, from a goods-based perspective, full membership should still be compelled, and when *decoupling* may be a more equitable alternative, also taking into account the particular needs and rights of children.

## Shielding Expressive Association

Freedom of association is intuitively a fundamental part of enjoying personal freedom, since "picking one's company is part of living as one likes; living as one likes (provided one does not injure the claims of others) is what being free means."[9] However, freedom of association, not expressly granted in the U.S. Constitution but by now legally well-established through a number of cases tried before the Supreme Court, is neither scholarly nor legally defended primarily on intrinsic grounds. An appreciation of its intrinsic value provides very little guidance with respect to the appropriate limits of associational freedom—especially in the question of membership discrimination. Rather, the scope of associational freedom is

9. George Kateb, "The Value of Association," in *Freedom of Association*, ed. Gutmann, 35–63, at 36 (see note 3 above).

usually negotiated with the many instrumental uses in mind that associations may have for democracy.[10] Functioning as a sort of school of democracy, associations purportedly allow members to interact in a way that fosters the virtues of "justice and fairness, fidelity and trust, integrity and impartiality," an effect that John Rawls describes as the "morality of association."[11] While the assumption of a necessarily positive socializing effect of associational life has been criticized empirically[12] and theoretically,[13] there remain "personal uses"[14] of associations for members that might nevertheless help stabilize mass democracies. By acting as counterweights to trends of social disintegration and personal anomie, associations, irrespective of their internal workings and teachings, may be beneficial to individuals in that they provide them with a stable social environment.

The most common and legally supported defense of associational freedom against equality claims rests on the assertion that it protects the necessary pluralism of opinions and choices that have to be open to citizens in their capacity as private persons, but also as political decision makers. By letting people associate and dissociate as they wish, the resulting associational sphere expresses what Rawls describes as the "plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life."[15] Voluntary associations thus represent "antihegemonic domains"[16] that not only help shield minority views from majoritarian pressures, but also hinder the government from abridging pluralism by actively

10. There exists a "remarkable consensus" about the function that a vibrant and pluralistic associational life plays for democracy among the various strands of democratic theory; see Mark Warren, *Democracy and Association* (Princeton, NJ.: Princeton University Press, 2001), 3. Warren surveys the thought of civic republican theorists, American pluralists, liberals, critical theorists, and as associative democrats, which all praise associational life for the role it plays in collective self-government, albeit with different emphases, at 3–38.

11. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Belknap Press, 1999), 413.

12. For example, see Tom Van Der Meer and Erik Van Ingen, "Schools of Democracy? Disentangling the Relationship between Civic Participation and Political Action in 17 European Countries," *European Journal of Political Research* 48 (2009): 281–308. See also Sheri Berman, "Civil Society and the Collapse of the Weimar Republic," *World Politics* 49 (1997): 401–29.

13. For example, see Chambers and Kopstein, "Bad Civil Society" (see note 6 above).

14. Nancy Rosenblum, *Membership and Morals* (Princeton, N.J.: Princeton University Press, 1998).

15. John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14 (1985): 223–51, at 225.

16. Robert Post, "Law and Cultural Conflict," *Chicago-Kent Law Review* 78 (2003): 485–508, at 504.

imposing values supportive of its own power and stability.[17] Defending group life rather than only individual freedom of expression is necessary to supply individuals not only with the opportunity to form an opinion but also with the essential organizational tools to develop an effective social and political voice. The hope is that a diverse associational landscape will permit "fluid pluralism," allowing citizens to change group attachments according to their evolving civic selves and to offset any potential harm of rejection they experience from one group by joining another.[18]

However, while there is clearly a strong liberty interest at stake in negotiating the limits of associational freedom, an appreciation of the instrumental uses of associations for democracy does not logically entail any clear position on anti-discrimination questions. After all, associations may actually better foster democratic practices and virtues among their members if the state regulates membership according to the standard of democratic equality.[19] Given the strong state interest in protecting civic equality, scholarly discussion and legal doctrine have concentrated on trying to extract which elements of associations need to be shielded from government regulation to ensure their instrumental functions. In the question of membership discrimination, a balance must be found between a "pure theory" of freedom of association that "holds that, what individual persons are free to do singly, they ought to be free to do in association with one another," and a "logic of congruence" that seeks to impose complete conformity with the liberal state's anti-discrimination values in order to prevent associational life from undermining civic equality by sheltering discriminatory practices.[20]

Associational freedom of *expression* is what both the conventional approach, first articulated in the legal realm by Justice Brennan in *Roberts v. United States Jaycees*, and the only discussed alternative account, associated with Justice O'Connor's

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17. Yael Tamir describes how government interference in associational life, be it through direct control or indirect funding, can lead to imprinting politically backed values onto the civic sphere, hampering non-partisan expressions of pluralism: "The civic sphere might then end up, as it did in Israel, as a reflection of the political map, where most associations—from charity organizations to soccer clubs—are divided among partisan lines" because "the government is likely to support its own interpretations, values, and policies," and neglect opposing world views. See "Revisiting the Civic Sphere," 224 (see note 7 above).

18. Rosenblum, *Membership and Morals*, 85; see also 59–61 (see note 14 above).

19. For a discussion of possible state regulation to enhance democratic functions and suppress anti-democratic tendencies, see, e.g., Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," in their *Associations and Democracy* (London: Verso, 1995), 7–98. See also Warren, *Democracy and Association* (see note 10 above).

20. Jacob Levy, *Rationalism, Pluralism, and Freedom* (New York: Oxford University Press, 2015), 42; see also 51–53. See Rosenblum, *Membership and Morals*, 36, for a discussion of the logic of congruence (see note 14 above).

dissenting opinion in the same landmark case, settled on, in two different versions. The conventional approach argues that membership discrimination should be allowed if forced inclusion would alter a specific associational message. The alternative account argues that certain kinds of associations whose activities are predominantly expressive should be shielded altogether from state regulation of membership policies. Both approaches thus focus on expressive discrimination as the sole exemption because it plays a crucial role in "shielding dissident expression from suppression by the majority."[21] Both, I will argue, fail to safeguard what they deem most worthy of protection, the associational capacity to enable democratically vital dissent.

### *The Message Approach: The Logic of "Expressive Exclusion"*

In the conventional message approach, discriminatory membership policies may be tolerated when the contested exclusion is integral to an associational message. In order to ascertain that this is the case, in the landmark case of *Roberts v. United States Jaycees* (1984), Justice Brennan proposed to apply a "nexus test" in matters of membership discrimination that scrutinizes whether there is a clear connection between the content of an alleged associational message and the exclusion of the controversial group. Associations wishing to discriminate in their membership thus have to demonstrate the existence of a message, and prove that this message would become distorted as a result of the compelled inclusion of an unwanted category of members. If such a nexus is established, the court then has to balance the importance of preserving the associational message against the legitimacy and urgency of the state goal pursued.[22] In *Roberts*, the Jaycees, an all-male membership civic organization geared toward the economic advancement and leadership training of young men, was prohibited from excluding women from full membership with the argument that such inclusion would not abridge any discernible associational message.[23] Following the *Roberts* decision, several voluntary associations that wished to discriminate in membership also lost in court for failing to prove message distortion.[24]

As Sonu Bedi retraced, the normative defense of the message approach relies on a principle of "expressive exclusion," which "seeks to endow certain groups

21. Brennan in *Roberts*, at 622 (see note 5 above).

22. To impede undue restriction of speech, the state goal must be compelling, must use the least restrictive means possible, and, importantly, must not be aimed at the suppression of speech. See ibid., 623–29.

23. Ibid., 627–28.

24. *Rotary* and *New York State Club Association* (for both cases, see note 5 above).

with the ability . . . to question the value of a particular law."[25] It allows a range of associations (religious and non-religious, voluntary associations, universities) to discriminate on otherwise suspect grounds only *when* and *because* it is "essential in creating genuine space for democratic dissent."[26] The logic of the focus on explicit message over other associational features thus becomes clear: "It is precisely because the association sends a robust message that permits them to exclude on otherwise prohibited grounds. Otherwise, we—those not in the association—would not gain from the exclusion. With no public message, the exclusion does not contribute to the marketplace of ideas."[27]

Defenders of the message approach thus insist on standards that an associational message has to meet to qualify for protection. Justice Stevens—writing for a dissenting minority in *Dale*, the case that allowed the Boy Scouts to expel an openly gay scout leader—demanded that: "at a minimum, a group seeking to prevail over an anti-discrimination law must adhere to a *clear* and *unequivocal* view."[28] To be democratically relevant, such clear messages must also arguably be discernible to the public. Developing this logic further, Jennifer Gerarda Brown underlines the importance of publicity and pre-existence as requirements and suggests that in order to be eligible for exemption, associations should ideally be forced to publicly register in which respects they intend to deviate from the prevailing anti-discrimination statutes. With the help of such an "Informed Association Statute," messages expressed by membership choices would be readily usable for public reaction and discourse, and future members forewarned about the discriminatory practices of their chosen association. Associations and their members would have to "come to terms with their own acts of discrimination"[29] upon founding or joining. No one could claim ignorance about supporting discriminatory messages, but neither would anyone have to endure a rough awakening like the one that presumably was at the root of the drop in membership after

25. Bedi, "Expressive Exclusion," 439 (see note 8 above).

26. Ibid., 428. Bedi thus shows that the principle of expressive exclusion grants exemption not on the basis of religious accommodation, or of freedom of speech or association more generally, but out of a democratic impetus that seeks to shield that range of associations whose dissent can be accommodated without undermining relevant law. Hence, it applies most directly to secondary voluntary associations.

27. Ibid., 437.

28. *Dale*, at 676; emphasis added (see note 4 above).

29. Jennifer Gerarda Brown, "Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute," *Minnesota Law Review* 87 (2002): 481–509, at 484.

*Dale* clarified and publicized the Boy Scouts of America's opposition to gay scouts and scoutmasters.[30]

Silence, then, and ambiguity where the exclusion of contested groups is concerned, are not protected by the logic of expressive exclusion. Associations must explicitly admit to their rejection of excluded groups in order to be eligible for protection. Mute resistance to ideals of civic equality does not contribute to the democratically productive market of ideas. Forcing associations to publicly announce their discrimination strategies in order to be exempt is thus meant to oblige them to enter their (now crystallized) message into the fray of public opinion and contestation. Only then is expressive exclusion deemed to be conducive to democratic negotiation, and anti-discrimination legislation kept safe from corrosion at the hands of private voluntary associations.

Even when membership exclusion is deemed to be part of a discernible associational message, it is not certain how the Court would balance between truly competing claims of equality vs. associational expression. In *Roberts* and a following case, no nexus between membership composition and message and no potential message distortion were recognized, and thus no meaningful balancing was necessary. In *Roberts*, the Court found that to admit that the Jaycees' viewpoints would be changed by admitting women as full members was to agree with sexual stereotyping and, as a result, it declined to acknowledge the nexus.[31] In *Rotary*, it offered that the club's aims would be even better achieved by allowing women as members, contrary to the association's own beliefs.[32] Without any message in peril of being altered by compelling membership, the state interest could carry the day without the need for balancing. In *Dale* on the other hand, when adjudicating whether or not the Boy Scouts of America could exclude a homosexual scout leader, the Court accepted the existence of a nexus, opting for a strategy of

30. Ibid., 494.

31. ". . . we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech"; see *Roberts*, 628 (see note 5 above). While Brennan did examine whether the state goal was compelling (see 623–26), he concluded that "in any event" the act did not impact much on the Jaycees' speech (628). For a discussion of this point, see also Seana Shiffrin, "What is Really Wrong with Compelled Association," *Northwestern Law Review* 99 (2005): 839–88, at 843.

32. ". . . the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes. . . . Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service"; see *Rotary*, 538–49 (see note 5 above).

double-deference. It deferred to both the Boy Scouts of America's understanding of its own message and its assertion about which kind of membership composition would interfere with said message.[33] However, the Court again did not have to engage in balancing because in this case it dismissed the state's anti-discrimination interest in one sentence.[34] "Balance" in the message approach so far thus seems to hinge mostly on the nexus test, however it is interpreted by the Court—if the claim of message distortion is accepted, associations can opt out of anti-discrimination regulation. Otherwise, the state interest prevails.

### *Failing to Protect Democratic Dissent*

Allowing expressive exclusion on the basis of message fails to adequately protect liberty, equality, and democratic interests at stake on two accounts. First, it risks at once being over- and under-protective of associational freedom with respect to its conflict with legitimate egalitarian state goals because of the instability inherent in the nexus test, revealing a problem of application.[35] Second, and more damningly, by shielding explicit message over other features of associations, it very likely fails to protect what it sets out to safeguard: the ability to form and express democratically valuable dissent. This reveals a more fundamental conceptual problem.

The difference in application of the nexus test between *Roberts* and *Dale* shows that deciding from the outside what exactly the content of a message is and whether or not it necessitates exclusive membership is difficult. It leaves much discretion to courts to impose their reading on the validity of a message, a weakness that undermines the message approach's aim of safeguarding essential democratic dissent—especially since judges, as everyone else, are subject to confirmation bias.[36] Associations have to fear interference for the lack of a clear and public message, or, if they have expressed one, for the possibility of different interpretations of the tolerable degree of abridgment of that message, depending on how the Court chooses to as-

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33. "It is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. . . . We accept the Boy Scouts' assertion [that the code to be morally straight and clean is incompatible with homosexual conduct]. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality"; see *Dale*, 651 (see note 4 above). "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression" (ibid., 653).

34. Ibid., 659.

35. Lacunae that O'Connor already noted in her concurrent opinion in *Roberts*, 632 (see note 5 above).

36. See Dale Carpenter, "Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach," *Minnesota Law Review* 85 (2001): 1515–89, at 1546.

certain nexus. If, as happened in *Dale*, judges lean toward generously reading associational message, too complete a shelter might be given to discriminatory groups that defy valid goals pursued by the state.[37] As Seana Shiffrin remarked, applied like this, it is "unclear how an association run by reasonably intelligent people could ever fail this test."[38] Of course, as argued above, the costs of discrimination go up, because unpopular opinions will be shamed once they are widely known, as happened to the Boy Scouts after *Dale*. However, depending on the reigning cultural consensus on what kinds of discrimination are shameful, the exclusion of unwanted groups might be quite pervasive.

More fundamentally, however, the wish to force clear stances *ex ante* on socially contentious issues is comprehensible in order to advance social change, but risks in its forced either/or choice to limit expressive freedom too much for it to yield its democratically beneficial effects. Only openly fanatic associations will be reliably protected, which creates a perverse incentive for clubs to become vocal on certain issues that have traditionally motivated state regulation, and to replace ambivalent and open-ended internal policies, by way of precaution, with more retrograde and exclusionary ones, thus hampering internal disagreement and potential evolution.[39] For expressive exclusion to play a role in the political negotiation of norms and practices, true dissent must be allowed to develop. Forcing groups to pick a side on sensitive issues in order to claim exemption might make it very costly indeed to hold opinions that are out of favor. From the perspective of wishing to enable democratic dissent such a standard risks being too stringent. Messages do not come about out of thin air, and unpopular ones in particular presumably need a resilient social basis to persist in the face of potential public backlash. Giving room to dissent might have to begin at allowing that all groups can potentially become expressive and eventually emit messages, even those that do not originally form for this purpose. As issues arise, hitherto non-expressive groups might proceed to express the distinctive voice that they previously merely embodied. Others might modify their stances on issues over time, start commenting on new questions, or go silent for a time or altogether. Interference with membership policy thus becomes espe-

37. Justice Stevens expressed this concern in his dissent in *Dale*: "This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further," at 686 (see note 4 above).

38. Shiffrin, "What is Really Wrong," 848 (see note 31 above).

39. See Madhavi Sunder, "Cultural Dissent," *Stanford Law Review* 54 (2001): 495–567.

cially problematic, because even if compelled integration of unwanted members does not alter existing messages, it nevertheless changes the face and voice of the association, and with this, potentially the content of future messages.[40] Shiffrin goes so far as to liken compelled membership to "mind control," because the psychological effect of even forced association can be identification and sympathy with the imposed members; at the very least it renders general, often abstract rejection personal.[41] But if close association with unwanted members inevitably changes one's attitude toward them—an effect that is clearly also intended by anti-discrimination legislation, in addition to counteracting the harm done to the excluded group of persons—compelling membership, unless there is a strong pre-established message against the unwanted members, risks undermining the very basis on which the normative argument for an associational right to discriminate rests. Expressive exclusion, in its function to safeguard democratic dissent and allow for the development and defense of unpopular opinions, would be largely impeded at its source. Compelled change of membership composition is then a forced alteration of the nature of associations. They are rendered "artifacts,"[42] and fall short of their democratic function and potential to allow and express social pluralism.

### *The Primary Nature Approach: A Viable Alternative?*

Given these problems of the message-based approach, some scholars favor Justice O'Connor's approach as offered in her concurring opinion in *Roberts*.[43] She suggested that groups should be protected on the basis of the predominant nature of their activities rather than their explicit message content. Non-intimate associations should be divided into primarily expressive and non-expressive groups, the latter ones subsumed under the label of "commercial" associations. If an association is dealing with ideas, opinions, and views, and has as one of its primary purposes

40. Rosenblum makes this argument in her *Membership and Morals*; see, e.g., 205–11 (see note 14 above).

41. Shiffrin, "What is Really Wrong," 874 (see note 31 above). Carpenter describes this effect using the example of homosexual members in associations: "A heterosexual may make abstract arguments supporting a gay equality claim and debate may ensue. But the moment a known gay person enters the room abstractions end. An openly gay person forces those around him to deal with their feelings about homosexuality in a much more personal way. The disputants confront a person, not just an argument. . . . Arguments about civil rights laws become discussions about whether *this person* should be fired or excluded. The whole dynamic changes when an openly gay person is present." See Carpenter, "Expressive Association," 1554 (see note 36 above).

42. Rosenblum, *Membership and Morals*, 41 (see note 14 above).

43. E.g., Mark Warren, *Democracy and Association*, 102 (see note 10 above).

the dissemination of viewpoints and messages, it should be understood as predominantly expressive and enjoy protection from state intervention in membership questions. If, however, an association deals to an important degree in the realm of material goods, it should be classed as commercial, and should be subject to state regulation to ensure equal access to its goods.[44]

Accordingly, no examination of potential distortional effects of state regulation is needed, for no regulation can be justified if the association is of expressive character. Instead, the difficulty lies in appropriately classifying the plethora of secondary voluntary associations as predominantly expressive or commercial. This categorization is complex, for unlike message, expression might be indirect and discreet, channeling worldviews through other activities. Not only can a "broad range of activities [. . .] be expressive," a variety of activities can also fall into either category, depending on the context they are performed in.[45] And no association, no matter how expressive in nature, can eschew entirely the realm of commercial dealings. Even an ideal type advocacy group will have to "collect dues from . . . members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings."[46]

The question arises therefore at what point commercial activities can cause clubs to forfeit their status as predominantly expressive. The "substantial degree" prescribed by O'Connor is by no means a clear standard;[47] the classification of associations cannot but remain "fluid and somewhat uncertain," especially when it comes to difficult cases such as fraternities or cultural clubs.[48] O'Connor acknowledged this problem, but asserted that the complicated task of differentiating between similar situations is neither avoidable nor unknown to courts, citing cases in which the Supreme Court had to arbitrate similarly difficult questions about the principal nature of associations.[49]

Like the message approach, however, with which it shares the fundamental justification of safeguarding democratic pluralism, this alternative account also risks at once over- and under-protecting freedom of association and thus of running afoul of both liberty and equality interests at stake. Allowing only minimal protection for associations found—at the time of conflict—to be primarily commercial risks stifling potential future messages of groups that might not yet be

44. *Roberts*, 635–36 (see note 5 above).
45. O'Connor, ibid., 636.
46. Ibid., 635.
47. Ibid., 636.
48. Ibid., 637.
49. Ibid., 637–38.

primarily expressive. Deciding on the basis of primary nature ultimately retains the same "pinched understanding of associational *voice*"[50] that also prevents the message approach from adequately protecting democratic dissent.

More alarmingly, expansively protecting expressive associations can undermine the state's egalitarian goals. This last concern is especially worrisome, as the foundational distinction between primarily commercial and primarily expressive associations seems inherently "very unstable."[51] If the distinction erodes and more and more associations have a claim to comprehensive protection as expressive associations, Andrew Koppelman warns that it "is hard to keep the logic of the argument from reaching the Civil Rights Act."[52] And indeed, views like that expressed by Richard Epstein, who on this logic thinks that only organizations holding any kind of monopoly should be regulated, risk allowing society to slip back into segregating practices.[53] While protecting associations especially with respect to their capacity for expression is necessary, it cannot go as far as to undermine crucial state policies ensuring democratic equality. The primary nature approach as well as the message approach thus seem inadequate to reliably safeguard necessary democratic dissent while defending important equality goals at the same time.

## A Goods-Based Approach

These difficulties suggest that the perspective underlying both approaches—protecting expression against equality claims—is what lies at the heart of the problem. Allowing membership discrimination only as part of expressive activity, be it as direct message or primarily expressive nature, reveals a conception of the values of liberty and equality that puts them in strong competition. The options allowed

50. Rosenblum, *Membership and Morals*, 204; emphasis added (see note 14 above).

51. Samuel Bagenstos, "The Unrelenting Libertarian Challenge to Public Accommodations Law," *Stanford Law Review* 66 (2014): 1205–40, at 1228; see also 1220, 1228–32.

52. Andrew Koppelman, "Should Noncommercial Associations Have an Absolute Right to Discriminate?" *Law and Contemporary Problems* 67 (2004): 27–57, at 42. In addition, any exaggerated trust in the auto-corrective powers of the associational market should be resisted. While a lively associational sphere certainly can often offer the excluded other alternatives and put individual associations under pressure to go with the times in order not to lose too many members, the history of anti-discrimination efforts suggests that without state intervention many egalitarian goals will not, or only much later, come about. For a discussion of this point, see ibid., 43.

53. Richard Epstein, "The Constitutional Perils of Moderation: The Case of the Boy Scouts," *Southern California Law Review* 74 (November 2000): 119–43, at 120–22. See also his article, "Public Accommodations under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right," *Stanford Law Review* 66 (2014): 1241–91.

are either full inclusion, presumably opening up *all* associational goods that come with membership to the new members also, or full exclusion, legitimized by the democratic need to protect even potentially hurtful opinions since the "majority could have gotten it wrong."[54] Balancing, in Brennan's test and the logic of expressive exclusion, is weighing claims and awarding one side the "win." I propose that a turn to differentiating among various associational goods for redistribution—rather than conceiving of associational goods as consisting simply in full membership—may offer an alternative in dealing with membership questions that is more successful at protecting both liberty and equality interests involved.

The fundamental assertion is that if vital egalitarian goals are at stake we should refrain from shielding any association completely, even those that have a message or are considered primarily expressive. In view of the crucial importance of associational freedom of expression for democratic dissent—but arguably also for its own sake with respect to the intrinsic value of freedom of association—we should, however, also not force associations to accept unwanted categories of members unless absolutely necessary for egalitarian purposes. The key to reconceiving of the balance between equality and liberty interests should therefore be to develop a more sophisticated understanding of the associational goods withheld from nonmembers, and to introduce a middle option of decoupling access to certain associational goods from full membership, rather than to deal out either compelled full membership or absolute exclusion. This is not to say that some cases may not warrant allowing full exclusion or compelling full inclusion if either the liberty or the equality interest is found to be paramount. But in the majority of cases, developing a range of possible government interventions by relying on a more refined theorization of the categories of goods at stake and their relationship to citizenship status of those excluded may allow us to find a compromise that is respectful of both interests. Balancing in the goods approach, then, describes a process which aims at achieving an equilibrium and reconciliation between the claims. It thus is better able to create and support a truly *fluid* pluralism, which is much lauded as a support for liberal democracy but is dependent on all citizens having access to the necessary resources to exercise their rights and freedoms.

### *The Range of Associational Goods*

The most important question for the goods approach is then, of course, which kinds of goods groups offer their members, and which of them may warrant state

54. Bedi, "Expressive Exclusion," 438 (see note 8 above).

intervention and of what kind. Given the importance of some associational goods for the realization of life chances, we should understand them as a subset of what Rawls termed "primary social goods": goods that rational individuals want because with "more of these goods men can generally be assured of greater success in carrying out their intention and in advancing their ends, whatever these ends may be."[55] As Stuart White has analyzed, associational goods might affect three kinds of individual interests that fall under the heading of primary social goods in this sense: "economic opportunity interests," "community participation interests," and "integrity interests."[56] Membership in associations can influence chances of acquiring income and wealth, and other opportunities that improve one's chances to realize one's life plans and ethical commitments. It can also represent an important opportunity to participate in the life of the community, especially if a club occupies a prevalent place in the larger community. Finally, associational life is a resource for a person's "freedom to shape and live authentically in accordance with a distinctive ethical personality," an important but for our purposes ambivalent interest that can lend legitimacy to claims both of inclusion and dissociation.[57] Understanding the interests at stake helps us identify the different possible motivations for regulation of membership chances.

However, economic opportunity interests can involve many possible opportunities of varying importance; not all clubs are prevalent enough in the wider community life for exclusion to impact on community participation interests; and integrity interests are held by both those seeking to become members as well as those seeking to exclude unwanted company. In order to allow for an equitable distribution of associational goods, we need to operationalize these interests and map them onto the range of distinguishable associational goods and practices. To this end, I suggest we classify associational goods with the help of three parameters: their materiality, availability, and valence. Differentiating among specific associational goods according to these parameters allows us to determine what kinds of goods particular associations offer, what harm exclusion from them causes with respect to the different interests at stake, and, if intervention is found to be warranted, whether decoupling could be the most equitable solution that respects the interests of all involved.

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55. Rawls, *A Theory of Justice*, 79 (see note 11 above).

56. I borrow the terminology, in slightly adapted form, from his useful analysis of the basic interests involved in associational life and membership exclusion, in "Freedom of Association and the Right to Exclude," *Journal of Political Philosophy* 5 (1997): 373–91, at 378, 382–84.

57. Ibid., 378.

The first parameter is the *materiality* of associational benefits. It clarifies the nature of benefits offered to members—and withheld from those excluded—and allows a determination about which of them can be decoupled from full membership for possible partial redistribution. With respect to their materiality, associational goods can include immaterial benefits, quasi-material advantages, and concretely material opportunities.

Immaterial goods can be further distinguished into general and association-specific benefits. *General immaterial benefits* describe goods that membership in presumably any association can bring: a sense of inclusion, belonging, social connectedness, and, as some scholars argue, the basis for self-respect.[58] These important but elusive advantages of association often depend to a large degree on the quality of personal relations within the group. They thus arguably presuppose a degree of exclusiveness, as relations are often closer within more selective groups. *Specific immaterial benefits* are intangible opportunities that may come with inclusion in clubs, like access to networks, information, connections, and recommendations. Other prospects might arise because of membership in a prestigious association. Not all groups provide these advantages equally, and their exact nature is particular to the association. Some of these benefits may depend on genuine acceptance and personal relations within a club, as other members must offer recommendations, introductions, business deals etc., and thus they often do not accrue equally even to accepted members. Even the more standardized immaterial benefits deriving, say, from having access to alumni connections or an old boy network arguably depend on members' willingness to share with other members and therefore the association's ability to select membership. A forced opening could cause discrimination to simply go underground as the group label no longer holds the same meaning for those opposed to the new members.[59] Redistribution of both general and specific immaterial goods is difficult, and it is impossible to decouple them from membership. Claims for access to these benefits, thus, should be understood and scrutinized as demands for full inclusion.

Associations may also offer a number of *quasi-material goods* to their members, which can have a direct impact on members' educational and socio-economic opportunities outside of the association in question, facilitating members' ability to realize their life chances and commitments. Such quasi-material goods comprise benefits that are still nonmaterial but already more tangible, like the acquisition and development of skills, social and otherwise, that might stem concretely from

58. For example, see Rawls, *A Theory of Justice*, 386–88 (see note 11 above).
59. Rosenblum, *Membership and Morals*, 170 (see note 14 above).

participation in classes and workshops. Finally, there is a wide range of outright *material goods* that come with membership in clubs, such as the right of use of facilities, access to services, and, crucially, eligibility for jobs in and even outside the organization. While immaterial opportunities cannot be decoupled from full membership, both quasi-material and material goods potentially can.

Once an association's range of goods is established, two further parameters—availability and valence—fully establish the nature of harm done to those excluded and the degree of intrusion that may be warranted to balance both liberty and equality interests.

Goods offered by associations are exclusive to varying degrees. Their *availability* is determined on the one hand by their level of uniqueness. Some goods will be exclusively provided by one association, as was the case for the "incomparable military college," the Virginia Military Institute (VMI), which offered an "adversative method" of instruction to its all-male student body. This didactic model was designed to allow the students a "heightened comprehension of their capacity to deal with duress and stress" and was an educational opportunity that was not available to women anywhere in the United States.[60] Even for goods that are not unique per se, their availability can depend on and vary with context: Some material or quasi-material goods may be readily available in one setting, such as access to associational film or book collections, workshops, or skill training that in an urban context can easily be obtained through membership in other associations, or provided by libraries or other service facilities in the same city. In rural areas, the same good may be hard to come by, and exclusion from membership in associations that do provide it may amount to exclusion from the use of this good *tout court*. Connected to the consideration of the degree of uniqueness, then, is the assessment of whether similar goods are accessible to the excluded from other sources, and if so, crucially, whether at a comparable price in terms of distance, cost, and ease of access. Understanding whether a withheld good may be available elsewhere allows a better determination of how the economic opportunity interests in particular are harmed by exclusion.

The third parameter to be taken into account when assessing the relative value and impact of an associational good, and thus the harm caused by exclusion, is its *valence*. The range of goods offered by associations, from immaterial to material ad-

60. *United States v. Virginia*, 518 U.S. 515 (1996), 519–20. The example is only partially relevant in this context in the sense that VMI is a government-funded institution, not a private voluntary association. Nevertheless, it is an instructive illustration of a unique good that discriminatory membership policies might withhold from non-members.

vantages, can have some degree of purchase outside of the association, enhancing their value beyond their immediate benefit. For instance, Koppelman notes how membership in the Boy Scouts of America, and especially prestigious ranks such as "Eagle Scout," are connoted positively even outside the organization and might lead to more opportunities in other contexts as well.[61] This speaks to the good societal standing of the Boy Scouts and makes membership especially attractive, as it offers advantages that other comparable associations of a smaller size and influence may not be able to reproduce, despite the similarity of the associational goods they offer in other respects. Assessing the valence of an associational good in other contexts thus allows a better determination of the impact that exclusion has on the economic opportunity interests, the community participation interests, and with them the integrity interests of those discriminated against.

In order to classify the nature and value of the goods at stake in membership conflicts, courts should rely on testimony of relevant witnesses (for instance the hiring practices of big local employers and the role that membership in the contested association plays for success in being hired); on expert witness assessments of the exact nature of the various goods a secondary voluntary association offers, their availability from others sources, and their valence in other contexts; and on statistical inquiry into the relationship between these goods and social and economic success of club members.

Taken together, these parameters allow us to classify associational goods and understand better their impact on life chances. All of these goods are of course desirable and can have bearing on one's economic, social, and even political opportunities. However, with a better idea of the extent of the harm done by exclusion from respective benefits, it is possible to determine whether access to specific goods, rather than compelled full membership, can already achieve offsetting this harm to a satisfactory degree.

### *When Should Full Membership be Compelled?*

The goods approach does not exempt *any* kind of private voluntary group on principle, even expressive associations with clear messages that would currently be completely shielded because of their importance for expressive freedom and democratic dissent. Therefore, it is important not to neglect the liberty interest at stake. While full inclusion and acceptance is of course the ultimate goal of anti-discrimination efforts, redistributing full membership should be the exception rather than the norm, due to its centrality for associational voice and the importance of

61. Koppelman, "Should Noncommercial Associations," 49 (see note 52 above).

associations for insuring the possibility of sustainable democratic dissent. Since membership should be a good that is more protected than others, when would the goods approach allow for a forced opening of associations? Such a decision should be based on the harms to material, community participation, and integrity interests of those excluded, operationalized with the help of the elaborated parameters. In this calculation the special needs and claims of children should also be taken into account.

*Harms to Integrity and Community Participation Interests.* Compelling full membership on the basis of harms to community participation and integrity interests is based on the idea that exclusion can ultimately represent, and even lead to the perpetuation of, second-class citizenship. Functioning like a stigma, the exclusion of certain categories of persons signifies civic inferiority and can cause loss of self-respect in those excluded, a concern that is of course most acute when the discrimination targets traditionally un(der)privileged groups.[62] The gravity of the "number of serious social and personal harms"[63] that can derive from this kind of invidious discrimination explains the current dichotomous practice that enforces full inclusion if anti-discrimination interests are found to be strong enough.

In order to decide when membership itself is the good to be redistributed and thus forcing full inclusion is warranted, several aspects should be taken into consideration. First, arguably not all exclusion signals intentional discrimination or perpetuates existing advantage structures.[64] Separatism, as opposed to discrimination, is conceivable. Some membership restrictions might be said to make no statement about the groups excluded, but only about the nature of the accepted members. Examples of such non-malicious separatism could be self-help groups, fraternities and sororities, ethnic or cultural clubs, or other groups that intend to foster feelings of some specified identity, be it brother- or sisterhood, or other shared outlooks or life situations. Nancy Rosenblum therefore warns of supposing congruence, meaning that exclusionary practices within associations should not be assumed to have a negative impact on dispositions and behavioral patterns in other

62. For example, see Robin Lenhardt, "Understanding the Mark: Race, Stigma, and Equality in Context," *New York University Law Review* 79 (2004): 803–931; Ilan H. Meyer, "Minority Stress and Mental Health in Gay Men," *Journal of Health and Social Behavior* 36 (March 1995): 38–56; Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon & Schuster, 1963).

63. *Roberts*, 625 (see note 5 above).

64. For a taxonomy of different types of discrimination, see Kaspar Lippert-Rasmussen, "The Badness of Discrimination," *Ethical Theory and Moral Practice* 9 (2006): 167–85.

contexts as well. On the congruence view, members of all-male clubs are expected to discriminate against women also in the economic or civic spheres, and so on.[65] If there can be separation for non-malicious purposes, this kind of exclusion would not in itself represent, nor cause, second-class citizenship of those excluded. Here, only the more material goods that might be withheld from the denied groups could contribute to inferior civic standing and prospects. While acceptance into clubs celebrating a specific identity might be very desirable for those that have no access, if those goods relevant for their civic equality were made accessible—potentially through decoupling—these groups' voices would not need to be forcibly altered. Full membership regulation in these cases should be of only a limited nature, because it tends to harm the good that regulation is supposed to distribute more evenly: the sense of belonging and acceptance. Second, historically disadvantaged groups might wish to discriminate against members of majority groups, and the effects of this discrimination would most likely not undermine equal public standing of the excluded, especially if potentially relevant goods could be decoupled.[66] Third, and most controversially, even outright discrimination against non-majority groups might warrant protection if we take seriously the role of dissent in liberal democracy.

Appraising whether membership policies should be shielded necessitates an analysis of the standing and influence of an association: is membership itself of such valence in other contexts that categorical exclusion ostracizes those who are left out? Otherwise, allowing even outright discriminatory intent against also otherwise disadvantaged groups might be exactly what a defense of democratic dissent entails. In *Roberts*, the majority of the Court deemed that exclusion from full membership in the Jaycees did denote and reinforce systemic discrimination and thus inferior public standing. Relegation to associate membership status reflected the "stigmatizing injury" that discrimination on the basis of sex generally caused women.[67] The Court regarded the Jaycees as influential enough to be akin to a place of public accommodation, an appraisal that has been contested.[68] From the goods perspective, most likely it depends on the locations of individual chapters—in urban contexts, alternative associations with similar economic and social influence and open membership policies exist. In rural areas, with a less lively associational

65. See Rosenblum, *Membership and Morals*, 36–41 (see note 14 above).

66. For a discussion of this point, proposing that separation by minority groups could be tolerated, when separatism of majority groups would not be, see "Freedom of Association," 384–85 (see note 56 above).

67. *Roberts*, 625 (see note 5 above).

68. For example, see Kateb, "The Value of Association," 58–59 (see note 9 above); Rosenblum, *Membership and Morals*, 171 (see note 14 above).

sphere, national organizations like the Jaycees may have very little competition and significantly outperform local alternatives in terms of material means and community impact. If they play a significant role in the community practices of their environment, full membership might have to be opened to spare those excluded the continuing relegation to the status of secondary community members.

The adult, openly gay assistant scoutmaster in *Dale* would remain excludable under the goods approach as such leadership positions are linked to expressing and inculcating the associational voice and cannot be decoupled from full membership. Already able to garner advantages from the status associated with the ranks of Eagle Scout and other inner-organizational distinctions that would be open to Dale as a youth (see the next section for a discussion why), the inability to serve as scoutmaster would likely not harm his economic opportunity interests. Similarly, while his categorical exclusion clearly denoted discriminatory intent, with respect to availability and valence the question would be whether adult voluntary involvement in the Boy Scouts rather than other similar organizations is so pervasive a practice that exclusion from it amounts to exclusion from an important pillar of the public life of the wider community, and thus significantly harms community participation and integrity interests. Short of such harm, the associational freedom to express meaningful dissent even with important egalitarian values is crucial in order to allow for a diverse and generative associational sphere.

Conversely, the Court's unanimous decision in *Hurley v. Irish-American Gay Group of Boston* to allow the organizers of the popular and widely attended annual St. Patrick's Day–Evacuation Day Parade in Boston to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston from marching under their own banner may have been decided differently under the goods approach.[69] The same goes for *N.Y. Cty. Ancient Order of Hibernians v. Dinkins*, which allowed the longstanding private sponsor of New York's St. Patrick's Day Parade to exclude the Irish Lesbian and Gay Organization from marching under a separate banner affirming their identity.[70] Both parades' organizers successfully refused allowing separate banners on the grounds that these would violate their first amendment right not to affirm those groups' identity.[71] These parades are of time-honored tradition

69. *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557 (1995).

70. *N.Y. Cty. Ancient Order of Hibernians v. Dinkins*, 814 F.Supp 358 (1993).

71. In fact, both cases were decided on freedom of speech grounds, with only secondary reference to expressive association; see *Hurley*, at 572–81 (see note 69 above); see also *Hiberians*, 366–67, 368 (see previous note). Nevertheless it is an interesting case from the perspective of the goods approach, and the fact that lower courts had in both cases deemed the parades to be more

and present themselves as widely inclusive community celebrations that attract thousands of participants, spectators, and viewers on television. Lower-level courts in both cases had therefore found the events to be akin to places of public accommodation and thus governed by anti-discrimination law. The Supreme Court and the U.S. District Court for the Southern District of New York disagreed and protected the parades as speech. From a goods perspective, the most pertinent question is whether the community participation interest of the lesbian, gay, and bisexual (LGB) groups was so gravely harmed by the exclusion that intervention would be warranted. Both parades allowed members of these groups to participate individually without a specific LGB banner; however, almost no other group was excluded from marching under their own sign, no written rules existed, nor was there a discernible expressive criterion uniting participants other than the participation in this "civic celebration" itself.[72] With respect to availability, then, the good of participation in such a prominent community event is difficult to replicate elsewhere, considering the size, tradition, and publicity of both parades. As *the* annual celebration of Irish-American identity and pride, the valence of marching with a banner in either parade is equally considerable. Exclusion from the opportunity to participate in a central communal event on the same terms as other citizens clearly harms community participation interests. Given the value of the good withheld and the fact that it cannot be decoupled from full participation, there is thus a strong argument to be made for compelling inclusion of the LGB groups in the parades under the goods approach.

*The Special Status of Children.* Changing our perspective to a goods-based approach would also allow us to consider better the special situation of children in the associational sphere and how exclusion may affect their interests differently from those of adults. The rights of children are not simply reducible to those of adults, and the duties of protection and care they confer not only to their parents

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akin to places of public accommodation and applied the principles of *Roberts* reveals the interpretative latitude with respect to proper classification.

72. *Hibernians*, 369, 363, citing a Massachusetts Superior Court with reference to the Boston parade, (see previous note). Also, describing the New York Parade: ". . . anyone who has watched the St. Patrick's Day Parade can attest to the fact that not everyone in the Parade is Irish, although at times it has been said that on St. Patrick's day, everyone in New York is Irish. The Parade marchers generally number in the vicinity of 150,000, with between one and two million on-lookers. The New York St. Patrick's Day Parade is carried by at least one local television station and quite often parts of it are shown on national television. The St. Patrick's Day Parade is billed as the largest annual civilian Parade in the world," (ibid., 361). A similar point is made in *Hurley*, 562, citing the state trial court (see note 69 above).

but also to the liberal state should lead us to scrutinize exclusionary membership policies of children's associations (e.g., boy/girl scouts, sport and cultural clubs, summer camps), or mixed groups that have also child membership, differently. However, neither variant of the two existing accounts of expressive exclusion makes allowance for the particular needs that children may have in the associational sphere, treating clubs of adults and those geared towards non-adults the same.[73]

While they are certainly rights-holders qua being human, due to their dependence on others, children are precluded from holding certain rights that adult citizens in a liberal democracy enjoy and have special interests that impose duties on direct caregivers and the liberal state. The most salient special right in the context of freedom of association is the "right to an open future,"[74] a term coined by Joel Feinberg, which entails that given children's status as "becomings"[75] rather than grown beings, the liberal state has a duty to defend their "anticipatory autonomy rights" and arguably also the future welfare interests of the child.[76] Next to the obvious economic opportunity interest of being able to partake in activities that train skills and offer educational prospects, this right to an open future also has a psychological component owing to children's greater vulnerability to the psychological harm of exclusion.[77] The experience of exclusion and rejection may have a stronger impact on the present and future community participation and integrity interests of children than those of adults, necessitating special care.

The vital good to be redistributed with respect to children will then in most cases be full membership, rather than material opportunities that could be decoupled. For associations that are primarily geared towards children, this means that the clubs cannot discriminate on the basis of suspect classifications. Separatism may be acceptable, if comparable goods are also available for those groups of children that are excluded. Exclusion with discriminatory intent, however, would call for compelled membership. Thus, restrictive all-girl or all-boy groups, for instance,

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73. Shiffrin similarly argues that freedom of association, as other constitutional rights, have to apply differently to children as not yet fully autonomous agents, in "What's Really Wrong," 880–88 (see note 31 above).

74. Joel Feinberg, "The Child's Right to an Open Future," in *Freedom and Fulfillment* (Princeton, N.J.: Princeton University Press, 1992), 76–97.

75. Barbara Arneil, "Becoming versus Being: A Critical Analysis of the Child in Liberal Theory," in *The Moral and Political Status of Children*, ed. David Archard and Colin Macleod (New York: Oxford University Press, 2002): 70–94, at 70.

76. Feinberg, "The Child's Right," 77 (see note 74 above).

77. For a discussion of the effect of social exclusion on children, see Melanie Killen and Adam Rutland, *Children and Social Exclusion: Morality, Prejudice, and Group Identity* (Malden, Mass.: Wiley-Blackwell, 2011).

could be acceptable only if comparable opportunities were available elsewhere also for girls/boys and if the case could be reasonably made that the separatism is not meant as a statement against the abilities of the excluded group, but for logistical or other practical purposes, or to celebrate membership rather than to express disdain. If mixed groups target children but mostly adults, a separate category must be opened for children versus adult members, with discriminatory practices only tolerated for the latter kind.

The egalitarian interests at stake in guaranteeing a fairly equal starting point to children of different backgrounds in this case trumps associational claims to be free to discriminate. Given that associations will still be able to differentiate in adult membership if they so wish, and are free to open up a special category of membership for children if they have not done so to begin with, the associational interest in living its voice is still appropriately taken into account. Despite the fact that parents may have interests in teaching their children that discriminating against a certain societal group is desirable, the liberal state has a rival duty to ensure these children's right to an open future.[78] Parental interests in ideological inculcation are still properly allowed for, since the associational sphere is not the only, nor necessarily the primary, venue for parents to instill their values in their children. That children's organizations cannot discriminate in their membership is warranted by the crucial interests at stake in guaranteeing equal protection of the possibility to flourish. The goods approach thus allows us to take into account that associations may have to be treated differently on the same principle when we deal with the rights and interests of children.

The Court's decision in *Dale* then would have been considerably more nuanced under the goods approach: In view of the Boy Scouts' near-monopoly status with respect to its importance, prestige, influence, and relationship to the state, the claim that its goods cannot be had elsewhere was particularly strong, despite the existence of other youth organizations that organize similar activities.[79] More importantly, the fact that discrimination was intended not only to target adults,

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78. For example, see Allen Buchanan, "Political Liberalism and Social Epistemology," *Philosophy and Public Affairs* (2004): 95–130, for a description of the "moral and prudential risks to which we are all vulnerable by virtue of our ineliminable social epistemic dependency" (99) and that discriminatory children's associations particularly embody.

79. For an overview of the monopoly-like place that the Boy Scouts hold in American society—for instance the explicit exemption from a federal statute prohibiting civilians from wearing uniforms similar to those used by the military, or the widespread knowledge and esteem of its ranks, such as that of Eagle Scout, well beyond the organization—see Koppelman, "Should Noncommercial Associations," 47–49 (see note 52 above).

but also children and youths, makes this exclusion exceptionally serious. Instead of wholesale protecting the Boy Scouts' rather shaky message of opposition to homosexuality, a goods approach would draw a distinction between the harm of exclusion from youth membership and that from adult leadership positions. It would compel full membership for Scout youths in the interest of granting children equal access to important goods and of insuring their self-understanding as future full members of society. Unlike the *Dale* interpretation of Brennan's nexus test, no sweeping right to discriminate against gays could have been granted on the basis of the purported message. Adjudicating membership conflicts from a goods-based perspective provides us with crucial conceptual resources to better take into consideration the special status of children with respect to their rights in the associational sphere.

### *Protecting Economic Opportunity Interests: Full Membership versus Decoupling*

As should be clear by now, the goods approach does allow compelling full membership if crucial anti-discrimination goals cannot be achieved by lesser degrees of intervention. However, full membership (and with it, presumably, access to the more elusive goods) should be forcibly opened only in cases in which exclusion from them causes or perpetuates harm to equal public standing as measured by impact on economic, participatory opportunity, and integrity interests of those excluded. The intuition is that quasi-material and material goods can be regulated much more than currently practiced, by decoupling access to these goods from full membership and opening them to excluded groups. This holds even when dealing with expressive associations that propose a clear message. To show this, I will first discuss when even material and quasi-material goods may require forced integration, and then elaborate the logic of decoupling and how it might change the calculus in many associational membership cases.

*Material effects.* As discussed, material and quasi-material goods can differ greatly in their availability and valence. Depending on the reach of an association, its position within the public sphere, and its influence on the economic and social market, decoupling its material goods may not be enough to offset the disadvantage that a group suffers from being excluded from membership. Here, a further discussion of the case of the forced integration of the Virginia Military Institute can serve as illustration of the logic of the goods approach. The Supreme Court ordered the all-male military institution to integrate women, because Virginia's belated attempt to create an alternative institution for women was deemed unsat-

isfactory.[80] Virginia Women's Institute for Leadership failed in "myriad respects other than military training, [to] qualify as VMI's equal,"[81] and was only "a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."[82] The court deemed that only if women had had access to a "position they would have occupied in the absence of [discrimination]," would the continuation of the all-male institution have been acceptable.[83] The most important good that VMI offered in terms of economic opportunity interests, its particular pedagogical approach and reputation as the "most challenging military school in the United States," could not be decoupled from full membership since the success of the valued "adversative method" depended on a comprehensive immersion into the particular way of life created at the Institute. The training employed at VMI was also not available elsewhere, as the alternatively opened institution failed to create a comparable good—it offered a "cooperative method of education which reinforces self-esteem" as a substitute, and set it up with only a fraction of the funding and quality of faculty, making it unlikely that the new institution could ever match an education received at the VMI in valence.[84] Denying women access to a unique and important formative opportunity represented a discernible harm to their economic opportunity interests, and with no option of decoupling, forced integration would also be warranted from a goods-based perspective. Since for groups in the associational sphere, unlike for the state of Virginia, it will be difficult to provide alternative venues to offer the same goods, membership will more often be compelled when the context of the association is meager in opportunities and the good offered cannot be reasonably decoupled. Another instructive case to illustrate the use of parameters in the goods approach in this context is that of *Mississippi University for Women v. Hogan*, in which the single-sex university was forced to accept a male nursing student, because a comparable education would have only been available over 100 miles away.[85]

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80. A lower court had directed Virginia to remedy the discriminatory treatment, by either admitting women to VMI, establishing a comparable institution for women, or abandoning state support of the institution, leaving it free to pursue its discriminatory policy as a private institution. Of course, according to the goods approach, this last option would not necessarily have remedied the situation.

81. *United States v. Virginia,* 551 (see note 60 above).

82. Ibid., 553, citing the U.S. Court of Appeals for the Fourth Circuit's decision in the same case, *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (1995), at 1250 (James Dickinson Phillips, Jr., dissenting).

83. Ibid., 547, citing *Milliken v. Bradley*, 433 U.S. 267, at 280 (1971).

84. Ibid., 548.

85. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

This reflection helps us reconsider the nexus test that the Court performed in *Roberts* from the perspective of economic opportunity interests harmed. One prong of its inquiry should have been whether the exclusion suffered by women as associate members rather than full members did in fact translate into diminished economic opportunities outside the association. Women had access to almost all opportunities offered by the Jaycees, with the exception of holding voting rights, being eligible for local or national office, and participating in certain associational awards programs and leadership training.[86] Were leadership positions within the organization in fact so prestigious even outside the club that they translated into improved job chances or communal influence? Did leadership training and awards programs bestow skills that were not available elsewhere also in terms of valence at a comparable price? The fact that in the controversial chapters women had been accepted as full members for a decade by the time of the judgment could have helped with informing this inquiry, allowing the Court to gauge the effects on economic opportunity interests for full members versus associate members. If in fact the opportunities attached to these withheld goods did significantly impact women's economic opportunity interests, under the goods approach a further inquiry would have been whether the harm inflicted could have been sufficiently mitigated by decoupling some of these goods. Relevant leadership training programs and maybe even relevant awards programs could have been opened to associate members as well, or equivalent skill and accreditation opportunities could have been created to allow women to access the same prospects as male members. An investigation into the material opportunities conferred by membership through the lens of the goods approach would thus have offered a better understanding of the harm inflicted and a broader spectrum of possible remedies.

*Decoupling.* One of the main advantages of the goods approach would thus be that with the option of decoupling, courts gain a new instrument to alleviate harms to equal citizenship while protecting associational freedom and dissent. To clarify the logic of decoupling further, imagine a sports club in a relatively rural area whose membership is restricted to wealthy, white businessmen. The use of well-kept facilities, access to sports classes, and access to jobs within the association are restricted to white men due to the club's explicit message of support for traditional gender roles and the superiority of the white race. Under the message approach, this exclusion might be protected, depending on whether courts apply the nexus test critically

86. *Roberts*, 613 (see note 5 above).

as Brennan did in *Roberts*, scrutinizing the plausibility of a nexus between sports and an ideological message, or deferentially as Rehnquist did in *Dale*, bowing to the club's own perception of this link between activity, ideological convictions, and membership restrictions. Given the dichotomous choice between either forced inclusion or protection of the discriminatory practice, liberty interests of the patriarchal supremacists and the equality interests of those excluded are put in strong competition. Under the goods approach, however, courts could adjudicate in a manner that protects the purported message and claimed freedom to associate with whom one chooses, while allowing those discriminated against access to many goods without full inclusion. Redistributable goods might be the opportunity to acquire or train certain skills, with the club forced to make access to facilities or classes available within parameters decided by the court. A similar rationale would hold with respect to participation in workshops, lessons, access to libraries, professional lectures or other services of other clubs that are currently beyond the scope of redistribution short of compelled membership. Most immediately relevant to civic equality is whether some of the jobs offered within the setting of the association would have to be opened as well to groups the club otherwise discriminates against. Exempting jobs that are tied to the expressive activities of the club, such as spokesperson, general manager, or other leadership and expressive positions, other posts could be considered for decoupling, opening them to non-members. Dale Carpenter suggested something similar when he proposed to modify O'Connor's approach by adding as a third category what he called quasi-expressive associations, such as private schools, media outlets, and certain large private associations, whose non-expressive activities should be regulated while their expressive activities should be protected.[87] Instead of limiting this procedure to an in-between category of quasi-expressive associations, the goods approach suggests applying it to the entire field of private voluntary associations. Rather than either forcing full membership or protecting message, it suggests decoupling access to contentious goods from membership, where possible, and thereby preserving associational voice better than the current approach.

The goods approach then promises to perform better with respect to the two failings of both the current message approach and the alternative primary nature account. First, by tracking more closely what harm exclusion inflicts on those dis-

87. Carpenter, "Expressive Association," 1576–87 (see note 36 above). The case he examines is *Runyon v. McCrary*, 427 U.S. 160 (1976), in which a segregated private school was forced to accept black students on the grounds that this would not distort the association's racist message; compelling schools to employ black teachers would.

criminated against, and introducing the decoupling of goods from membership as a regulation option, the goods approach allows for a more nuanced balance between the competing interests involved that avoids dichotomously under- or overprotecting associational expression. Second, democratic dissent is more reliably protected because it is no longer associational message—or primarily expressive activity—that determines protection from state intrusion in membership policies. By focusing on redistributing goods rather than the reason for exclusion, the goods approach does not scrutinize the validity or rationality of contested exclusion; there has to be no previous message that declares or implies the necessity of discrimination. The claim to restrict membership at the time of litigation is taken as proof of an existing intention to deviate from majoritarian equality norms.[88] In this way, adjudicating from a goods-based perspective protects voice more reliably and allows for a dynamic process of opinion and message creation and evolution.

Of course, as in the conventional approaches, courts' assessments of the facts of a case matter: Whether or not the goods conferred by membership are of relevance for civic equality has to be established by a factual inquiry that always calls for an appraisal that can never be entirely objective or predetermined. However, as O'Connor pointed out in her concurring opinion in *Roberts*, not only is such the task of judges and courts; in the complex field of associational life there seems to be no simple rule that could turn the muddled waters into clear-cut cases. As the goods perspective allows courts to distinguish between the different interests involved and to operationalize them with the help of the elaborated parameters, these assessments are made transparent and traceable. Relying on a fundamentally different idea of balance, the goods approach furthermore moves away from the zero-sum logic of expressive exclusion, seeking instead equitable reconciliation between liberty and equality interests where possible. With decoupling a viable middle option for regulation, in many cases we therefore avoid the risk of either harmful intrusion into the formation and vocalization of vital democratic dissent, or a neglect of claims of fair access. In that sense, less is at stake in terms of the gravity of legal assessments.

Some might argue that the goods-based treatment of associations could translate into a punishment of "successful" clubs because only those that offer substan-

88. From a perspective of wanting to foster democratic disagreement and enabling expressive opposition, it is in fact absurd to oblige valid dissent to have been uttered clearly and verifiably in the past in order to merit protection. The fact of ongoing and potentially costly litigation should be seen as a sign that, at least now, the association must feel strongly enough about the exclusion to want to invest in its defense.

tial goods to their members would be singled out for intervention.[89] While this observation rings true, the intervention into successful clubs and thus differential treatment of similar clubs is nevertheless warranted by egalitarian concerns, for otherwise the equality claims of democratic society cannot properly be taken into account. If we are to protect dissent and enable rough statements of rejection and exclusion in the civil sphere, we also have to ensure that all participants are fairly equally equipped with the necessary goods to pursue their respective conceptions of the good and to contribute to this contentious pluralist debate. Only then the much-desired fluid pluralism can develop, to offset individual rejection, multiply opportunities for expression, and invigorate a lively, multi-vocal democratic discussion. In this sense, then, because of the possibility of decoupling, the goods approach promises to contribute more to bringing about this fluid pluralism than the current practice does.

## Conclusion

Concerning material opportunities the goods approach goes much further in protecting egalitarian considerations than either the message or primary nature approaches, as no group is completely shielded from potential intervention. Even in a culture of pervasive prejudice and strong discriminatory messages, important goods would be available to those that associations wished to exclude. This possibility of intervention signals to associations that they cannot completely opt out of the larger society's struggle to ensure equal rights for all citizens. It does so, however, without excessively curtailing associational expression, because even if intervention occurs, in the majority of cases relevant goods will be decoupled from membership, rather than the association being forced to accept unwanted groups of new members. This protection is allowed even without a strong message of discriminatory content, and thus serves to protect associational *voice* rather than concrete message. Furthermore, litigation about access to these goods would have the same signaling effects that the message approach currently has, sparking public debate, reaction from members, and, possibly, push for more inclusive policies from inside the organization. Given the possibility of intervention for all groups, an incentive would moreover be created for clubs to use the option to make contested

89. Douglas Linder made this observation in 1984 with respect to Brennan's focus on the state's interest in ending discrimination; however, the criticism can be applied to the goods-based approach as well. See Douglas Linder, "Freedom of Association after *Roberts v. United States Jaycees*," *Michigan Law Review* 82 (1984): 1878–1903, at 1890.

goods available for non-members in order to avoid legal challenge. Thus, the important state goal of ensuring equal citizenship conditions can be more effectively pursued without curtailing associational freedom to voice opposition to majority norms.

Considering the persistent condition of pluralism in Western liberal democracies, it is crucial to find the right balance between, on the one hand, preserving the liberty to associate with whom we choose (and to voice and live accordingly to the ethical principles we adhere to), and, on the other hand, guaranteeing a sufficient set of opportunities to realize these freedoms for all citizens in the first place. Many promises of liberal democracy depend on the liberal state's capacity to ensure equal access to fundamental goods, not least the meaningful possibility of exit from society's subcultures to a common, shared citizen space. If crucial goods are withheld from groups of citizens because of discrimination, their access to civic culture and thus fluid pluralism is hindered. Taking a goods perspective avoids the stark dichotomy between extensive protection and compelled membership, and thus promises to better safeguard both equality and liberty interests at stake.

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