

The First Amendment and the Mind/Body Problem

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I. INTRODUCTION

The purpose of this Article is to advance three propositions as worthy of consideration by courts when deciding cases involving a conflict between the First Amendment and the Fourteenth Amendment's Equal Protection Clause.

The first proposition is that cases brought under the First Amendment should take as their core concern the inherently private nature of mental life, as distinguished from political and social interactions. This is a departure from the more traditional view that First Amendment protection is necessary to guarantee truth and democracy.² My goal is not to suggest that mental life is under some sort of direct attack, but rather to suggest a natural privacy essential to individual liberty that mental life affords.³ In this sense, the purpose is to protect the *a priori* conditions of liberty as a precondition to the protection of liberty itself.

The second proposition is that cases brought under the Fourteenth Amendment's Equal Protection Clause should focus on the status of individuals within society and should be concerned, at least in the first instance, with significant departures from legal equality or serious cultural impairments to full equality of opportunity that arise from the operations of government or the laws of the state. The use of the words "significant" and "serious" here is not only meant to avoid debates over issues properly designated as *de minimus*, but, more importantly, to suggest that not all impairments will affect individual life prospects to the same degree. In this sense, the Equal Protection Clause may operate more at the empirical level in the way society's institutions treat its

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2. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-46 (1982).

3. René Descartes, in his sixth meditation, set out, perhaps for the first time, the idea of mental life being private and comprising a separate realm of existence from body. See generally René Descartes, *Meditations on First Philosophy, Meditation 1*, in CLASSICS OF PHILOSOPHY 497, 497 (Louis P. Pojman ed., 2003). The issue is somewhat controversial whether this Cartesian distinction really designates an area of metaphysical or grammatical difference. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 246-53 (G.E.M. Anscombe trans., Macmillan 3d ed., 1953). For reasons I explain later, I treat this as an ontological difference with causal overlap.

citizens.⁴

The third proposition is that in cases where the issue is to delimit the boundaries of protection between the First and Fourteenth Amendments, the pendulum of determination is whether the facts directly affect freedom of thought by altering the inward domain of consciousness, or whether they directly implicate the legal or social status of some individual or group to operate within or obtain opportunities from the official organs of society. The current line of United States Supreme Court cases regarding freedom of association—*Roberts v. United States Jaycees*,⁵ *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*,⁶ and *Boy Scouts of America v. Dale*⁷—do not provide clear boundaries on First Amendment values outside of which the state may promote equality concerns. The third proposition is meant to rectify this matter.

Part I of this Article will make the tension between First Amendment liberty and Fourteenth Amendment equality more precise, including some indirect applications of promoting equality in employment, housing, and public accommodations through statutes. Part II will set out some very general background principles of the First Amendment and the mind/body problem as beginning the process of seeing speech acts as related to the ontology of mind, as distinct from equality as a status concern related to the ontology of the bodies that bear that status. Part III will then take up the issue of political speech and its relationship to the mind as already presupposing an equality of citizenship related to status. Part IV will discuss the three aforementioned cases to show that at least one holding was incorrect because the Supreme Court misstated material facts when distinguishing political from nonpolitical speech. Part V will then apply this analysis more broadly to other First Amendment cases to determine whether it makes sense within the current scheme of First Amendment jurisprudence. Finally, Part VI will set out a general conclusion suggesting a better view for the future of this area of the law. The goal of this Article is to move quickly from a partial description of what the Supreme Court has already done, to a set of criteria for how courts should decide future cases in this area of law. In this sense, the Article is meant to be not only descriptive, but also inferential.

II. THE PROBLEM

The difficulty in framing the issue arises from confusion over what exactly the First Amendment protects. Is it primarily speech and the associations that indirectly stem from such expressions that the First Amendment protects? If

4. I avoid issues of private treatment as these are more properly within the realm of statutory regulation.

5. 468 U.S. 609 (1984).

6. 515 U.S. 557 (1995).

7. 530 U.S. 640 (2000).

so, then why did the Court rule in *Roberts* that the Jaycees could not exclude women from membership where the organization's purpose was advocating careers for young men? Or, is it that speech stems from ideas alone while associations—even associations for the purpose of promoting a certain speech—require equality, at least when the perception is that membership affects the political, social, or economic status of persons? If the latter holds true, why was the Court willing to allow the Boy Scouts to exclude Dale as an assistant scoutmaster because he was a homosexual, when clearly such membership affords, at most, a neutral recognition of gays and lesbians participating in society's important social institutions? Was the Court simply acting on a prejudice against homosexuals as opposed to an equality of opportunity standard for all people? The Boy Scouts did not claim, let alone show, that the presence of lesbian, gay, bisexual, or transgender (LGBT) persons as scout leaders would *directly* harm the membership or scouting activities *qua* scouting.

I want to suggest that part of the difficulty in making sense of the Court's reasoning is that we lack a principled way to distinguish concerns related to speech from those related to status. The two are intertwined, at least in part, because from a certain point of view, status can be thought of as an indicator of mental life. For example, the status of a seminarian seeking ordination into the Roman Catholic priesthood probably implies to the bishop who ordains him that he desires to affirm in actions or words the teachings of the Roman Catholic faith. And to the laity who he may then serve as a priest, his status implies a willingness to fulfill those functions expected of someone of his office, most likely including certain public behaviors, dress, and a willingness to attend spiritually to the sick and to perform certain rituals. And so there appears to be a link between what a person says, advocates, or promotes, and the position or office he or she holds.

One recent political example concerned President Clinton's alleged perjury regarding the Monica Lewinsky scandal. As the highest executive officer of the country, it was required that "he shall take Care that the Laws be faithfully executed."⁸ A problem arises, as in this case, when the message is less closely connected with the office and more connected to one's private life. In Clinton's case, the issue was whether he was defiling his oath of office as President of the United States when he allegedly lied under oath in a civil deposition proceeding. In *Dale*, the issue was whether Dale violated the Scout law or the Scout oath when he sought to be an assistant scoutmaster as an openly gay man where he had no intention of advocating for gay issues within the Scouts.

Accordingly, I will argue that behind even the most robust First Amendment protections for political speech lies a principle of autonomy that delimits the

8. U.S. CONST. art. II, § 3.

mental and physical worlds. I will further claim that the Court's efforts to define this boundary in both *Jaycees* and *Hurley*, but not *Dale*, is related to its understanding that associations, like human beings, rarely fall exclusively to one side of the division, but instead often skirt the line, creating an ambiguity over where expression ends and concerns regarding status begin. Like human beings, associations may exploit this ambiguity not only to market their own ideas, but to control their membership as well. But associations encounter limitations when the agreements that define them, including who can become members of the association, take on a broader social status—either de jure or de facto—that effectively limits nonmembers from the opportunities of full participation because some in society privilege membership in allocating jobs and other benefits. In that instance, the issue is not in the first instance free expression, but rather equality, and where the Court should demark the boundary between the two.

From its very inception, the First Amendment and the other nine amendments of the Bill of Rights were collectively an insurance policy to limit an all-too centralized and powerful national government from abusing individual liberty.⁹ The Bill of Rights was the anti-federalist contribution to America's constitutional founding.¹⁰ One such example of a possible abuse of individual liberty that the First Amendment addressed was state adoption and support of a national religion.¹¹ England established the Church of England as its national religion, which led many of the first Americans, or their close relatives, to settle in the new continent to avoid religious persecution. A related concern at the time of the Constitution's adoption was the desire to obtain a guarantee from the government for the free exercise of religion.¹² From the early period of the republic, Connecticut and Massachusetts continued to levy taxes for support of religion because the First Amendment had not yet been interpreted to restrict this activity; instead, it was viewed primarily as a limitation on the authority of the new central government the Constitution had created.¹³ The Virginia Declaration of Rights had disestablished the Anglican

9. HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR* 64-65 (1981).

10. STORING, *supra* note 9, at 64.

11. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

12. *See* STORING, *supra* note 9, at 64 (noting free exercise clause provided right to be free from government interference).

13. Courts eventually found that the First Amendment, along with several of the other amendments of the Bill of Rights, limited state government actions via the Fourteenth Amendment's incorporation doctrine. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding Fourteenth Amendment embodies First Amendment). *But see* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 288 (1985); STORING, *supra* note 9, at n. 48 ("John Marshall's decision in *Barron v. Baltimore*, [32 U.S. (7 Pet.) 32] (1833), ruling that the Bill of Rights did not apply to the states").

Church of England, but never gave Baptists and other dissenters full recognition.¹⁴ In Virginia, Patrick Henry proposed incorporating the Protestant Episcopal Church, which would have made them self-supporting by giving their vestries landed property.¹⁵ Another bill proposed a “General Assessment” to support teachers of Christianity.¹⁶ And so, the First Amendment may be seen, at least in part, as a guarantee against similar federal government sponsorship of religious status.

A related but opposite historical claim exists regarding adoption of the Fourteenth Amendment as one of the three post-Civil War reconstruction amendments. Here, Congress and the state legislatures felt it necessary to go beyond the liberty provided to former slaves to sell their labor power on the open market as set out by the Thirteenth Amendment, which ended slavery in the United States.¹⁷ It was thought also to be necessary to ensure that the former slaves would obtain the equal status of citizens, including rights to due process, all privileges and immunities, and equal protection of the law, which the Fourteenth Amendment would provide.¹⁸ Further, many thought that guaranteeing the right to vote by adoption of the Fifteenth Amendment would most strongly assure protection for the rights of former slaves in the long run.¹⁹ The specificity of the freedoms former slaves were now to enjoy suggests that “Reconstruction Amendments” were mostly about the *status* of the former slaves now freed. The amendments also signaled a return of authority to the national government to regulate status for the sake of granting equality to disenfranchised groups. The federal government has been regulating status ever since, via Supreme Court interpretations of the Fourteenth Amendment, including in the areas of gender equality, and Congressional passage of Title

14. See MCDONALD, *supra* note 13, at 44.

15. See MCDONALD, *supra* note 13, at 44.

16. See MCDONALD, *supra* note 13, at 44.

17. The Emancipation Proclamation ended slavery in those states still at war with the Union when President Lincoln issued it on September 22, 1862. See No. 16, By the President of the United States of America: A Proclamation, 12 Stat. 1267 (1862). Section 1 of the Thirteenth Amendment, adopted in 1865, ended slavery throughout the United States with the words: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend XIII, § 1.

18. Section 1 of the Fourteenth Amendment, adopted in 1868, provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

19. See U.S. CONST. amend XV. Section 1 states, “The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” *Id.* § 1.

VII and related federal statutes. Therefore, any concerns to keep government from protecting the status of equal citizens in the name of liberty have pretty much evaporated.

More importantly, the covenant between the federal government and its people, represented by the Fourteenth Amendment's Equal Protection Clause, represents a particularistic morality that came about to correct an inequality between former Negro slaves and the majority white population.²⁰ In a sense, one can view the amendment as upholding a principle of universal morality that every person has a right to freedom and well-being, but only to the extent that they do not violate any other person's equal moral rights.²¹ Consequently, if the nature of our legal or social environments is such that they deny people full opportunities to use their freedom, not because they violate the rights of others but merely because society disdains their status, morality requires that the situation be corrected.²² The exact correction can be calibrated to the particular social conditions that gave it rise, as with case of adoption of the Fourteenth Amendment.²³ Hence, a covenant that allows the government to intervene when people's rights are not recognized, in order to guarantee the opportunities of full citizenship, is one particularly satisfactory way for government to meet its obligation in this respect under universal morality. But, of course, the form of intervention must not unnecessarily impinge other important rights that universal morality also recognizes, especially as those might bear on the self-fulfillment that arises from group identification.²⁴ The difficulty lies in delineating a principled point at which individual liberty leaves off and establishing an equal concern for the well being of other human bodies begins.

In the end, the problem is both theoretical and practical. On the theoretical side, the difficulty lies in setting forth a formula that can produce both freedom and equality without contradiction. On the practical side, it is difficult to specify the factual determinants that will form the issue either as one of freedom of thought or status. In other words, it is difficult to formulate the distinction between speech and equality on criteria that emphasize either beliefs and ideas, or privileges and benefits. With regard to the former, the issue is one of expression, the primary concern being mental life; regarding the latter, the issue is one of equality and how societal institutions view individuals.

The problem seems difficult to resolve because equality itself is an idea; therefore, the conflict between liberty and equality appears like a conflict

20. The amendment provided a broad definition of citizenship, which previously excluded African-Americans, and provided equal protection of the laws to all persons, including non-citizens within their jurisdictions. U.S. CONST. amend XIV.

21. See ALAN GEWIRTH, SELF-FULFILLMENT 140-58 (1998) (discussing relationship of particularist morality to universal morality as understood by at least one moral theorist).

22. GEWIRTH, *supra* note 21, at 155.

23. GEWIRTH, *supra* note 21, at 155-56.

24. GEWIRTH, *supra* note 21, at 155-57.

between ideas. Because equality is an idea, its existence in society requires the objective standard of an agreement as to how individuals or groups will be treated. There is no such agreement required for a thought. Indeed, it is this aspect of thought per se that provides it a level of free subjectivity not attached to equality in general, separating it ontologically but not causally—people are often influenced by what others think of them—from status in general.

III. NATURE, LAW, AND THE MIND/BODY DISTINCTION

One finds a paradigm for thought about liberty in general, and the First Amendment in particular because it is attached so closely to personal freedom, in John Stuart Mill's classic, *On Liberty*.²⁵ There, Mill writes:

But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance: for whatever affects himself, may affect others *through* himself This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.²⁶

Behind Mill's description lies a presumption in favor of freedom of thought and respect for the inward domain of conscientiousness. As Mill admits, whatever affects oneself may affect others through oneself. The latter effect seems more about the relations of bodies rather than minds, even though one's own mental life may affect the relation. A first glance suggests Mill is adopting the Cartesian distinction between mind and body.²⁷

Since Descartes's *Meditations into First Philosophy*, philosophers have had to confront the "Doctrine of Representative Perception" as interposing the new element of the human mind between what ancient philosophers, like Plato and

25. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* PHILOSOPHY OF LAW 180, 181 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).

26. MILL, *supra* note 25, at 268.

27. Mill would not consider himself a rationalist as the distinction suggests. His view was much too empirically based to be a rationalist position. Yet, like David Hume, there appears a sense in Mill's writings that the mind plays at least a unique role for which sense data cannot fully account.

Aristotle, understood as a direct relationship between our perceptions and the world.²⁸ Under the new doctrine, no matter how clearly we express our ideas, the question will always remain, whether our perceptions actually report what exists in the world or only what is present in our minds. Descartes, and the other Cartesian rationalists who followed him, thought that the obscuring nature of our sense perceptions rendered them capable of little help.²⁹ By contrast, empiricists like Locke, Berkeley, and Hume believed that experience via our senses (both outer and inner) is the ultimate judge of reality. Berkeley was unique, however, in believing that though experience was the judge, experience could not present to us objects as anything other than ideas in our own minds, including being present in the mind of God.³⁰ Belief that these ideas were simultaneously present in the mind of God was necessary to maintain continuity in the world when we were asleep. Berkeley departed from Locke who thought that a body's primary qualities (like shape and extension) were distinct from its secondary qualities (like color) and reflected the truth of the body itself.³¹ Hume extended, without metaphysical proof to backup his belief, the idea that our strongest impressions were most likely true of the world.³²

Current struggles to explain human volition and consciousness as more than mere artifacts of neurological states illustrate the contemporary difficulties of holding to these classical viewpoints, though the language of neuroscience and that of intentionality do not appear to be commensurable.³³ These debates concerning the metaphysics of mental life implicate beliefs society holds about how individuals become responsible for their own behaviors. Careful analysis of a situation often implicates one's values, especially where one is charged with failing to conform personal behavior to standards set by a particular value system. In such circumstances, the law presumes that those subject to it author their own decisions, and that such authorship cannot be merely the product of external causal laws as described within the fields of biology and psychology, but must be related to some aspect of the person's own decision-making

28. CAMBRIDGE DICTIONARY OF PHILOSOPHY, 656 (2d ed. 1999) (discussing "representative reality").

29. Descartes, *supra* note 3, at 497.

30. George Berkeley, *Of the Principles Concerning Human Knowledge*, in CLASSICS OF PHILOSOPHY 691, 694 (Louis P. Pojman ed., 2003).

31. See John Locke, *An Essay Concerning Human Understanding*, in CLASSICS OF PHILOSOPHY 653, 666 (Louis P. Pojman ed., 2003).

32. David Hume, *An Enquiry Concerning Human Understanding in Classics of Philosophy*, in CLASSICS OF PHILOSOPHY 728, 733-34 (Louis P. Pojman ed., 2003). As Hume states, "When we entertain, therefore, any suspicion that a philosophical term is employed without any meaning or idea (as is but too frequent), we need but enquire, from what impression is that supposed idea derived? And if it be impossible to assign any, this will serve to confirm our suspicion." *Id.* at 735.

33. See JOHN SEARLE, FREEDOM, AND NEUROBIOLOGY: REFLECTIONS ON FREE WILL, LANGUAGE, AND POLITICAL POWER 37-78 (2007); Donald Davidson, *Mental Events*, in ESSAYS ON ACTIONS AND EVENTS 207, 223-25 (1980).

process.³⁴

Kant, in particular, explained the distinction between mind and body regarding practical decisions as reflecting an ontological separation between the intellectual self who must presume itself to be free and the phenomenological self whose actions are products of external and internal causes.³⁵ Here, the phenomenological self sees the ego as part of a world, subject to the natural laws of cause and effect.³⁶ In contrast, the intellectual self perceives itself as making choices within that world based on rational reasons.³⁷ Kant viewed these two standpoints as standing side-by-side without contradiction since they address two fundamentally different forms of perception. The latter represents a rational process in which the mind prescribes for itself the moral law by holding the correctness of its decisions to be based on whether they can be universalized without contradiction and, if so, whether they can then be acted on by a rational agent who understands the way in which her judgments might later come back upon her.³⁸ In contrast, the former represents a descriptive or inferential process through which the mind understands human behavior, as well as its limitations, only by seeing human beings as natural objects subject to the laws of nature that all natural objects are bound to follow.³⁹

Most nations with well-developed legal systems encompass within their criminal law a basis to excuse a person for committing a crime if the person, at the time of the act, was unable to know her actions were wrongful due to a mental disease.⁴⁰ In some places, this defense—known as the “insanity defense”—also includes inability to conform one’s behavior to one’s diminished capacity due to mental disease.⁴¹ Whatever form of the defense

34. See Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031, 1035 (2003).

35. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 64 (Lewis White Beck trans., Prentice Hall 1995) (1959).

36. KANT, *supra* note 35, at 69. Here, the natural cause could include irrational internal forces, such as depression.

37. KANT, *supra* note 35, at 67.

38. In his discussion of the Categorical Imperative as the fundamental moral law, Kant notes that failure to arrive at a contradiction when universalizing one’s maxim—as might happen when one commits suicide out of self-love or makes a lying promise of repayment to secure a loan—only means that one does not have a perfect duty against such behavior that applies in all circumstances. KANT, *supra* note 35, at 39. Still, while some actions would not produce a formal contradiction when universally allowed, Kant nevertheless believed that these actions ought not to be undertaken too frequently. *Id.* at 40 (citing as examples failure to develop one’s talents or never giving to the needy). He believes one has at least an imperfect duty to avoid such actions because they may run contrary to what can be rationally willed, given one’s inability to know the future negative repercussions of one’s own choices. *See id.*

39. See KANT, *supra* note 35, at 65 (arguing heteronomous theories “unfitted to serve as an apodictic rule of action” due to contingency).

40. See *M’Naghten’s Case* (1843) 10 Cl & Fin 200, 209, 8 ER 718 (declaring criminal law regarding persons with “insane delusion”). The court held that the law punishes one who commits a crime, provided one knew such action constituted a crime. *Id.*

41. See Model Penal Code § 4.01 (2001) (explaining that lack of criminal conduct precludes

carries the day, the law usually confines the accused in a psychiatric facility where rehabilitation and treatment are the central focuses, so as to protect society and the individual from further harmful behavior.⁴² The “insanity defense” contrasts with the more traditional criminal law notion that the accused acts voluntarily unless proven otherwise, and if convicted may face imprisonment in a penal institution.⁴³ According to this rationale, because a person can choose not to commit a crime, the law punishes her for the crime she committed.⁴⁴ Based on these criminal law distinctions, most western societies with developed legal systems have held that because mind and body are sufficiently different along a wide range of frontiers, one cannot properly treat them as if they were merely two descriptions of the same phenomena.

Descartes was perhaps the first to fully contemplate the important difference between mind and body when he recognized them as two uniquely different substances.⁴⁵ Kant extended this claim after Hume admitted that he could not find adequate grounding within empiricism for a mental process that could establish personal identity across different events.⁴⁶ For Kant, the claim was that the two substances had to operate by different principles, and that a heteronymous descriptive laws governing body could not replace the rational mind’s insistence on following reason as a self-imposed determinant of autonomous human actions.⁴⁷

I suggest that this tradition, as much as Mill’s concerns over abuses by the sovereigns of his day, accounts for his absolute *presumption* in favor of freedom of thought and strong presumption in favor of freedom of speech.⁴⁸ Surely, one cannot doubt the historical influence that politics played, such as persecution based on one’s beliefs, and has had on the development of many western democracies, including the United States.⁴⁹ However, the degree of antipathy and disquiet that has accompanied persecution of this genre more than others no doubt flows from some rudimentary idea that the “inward domain of consciousness,” as Mill calls it, is significantly separate from that of the body, which may be seen and observed and which often affects others. This difference, which the human understanding acknowledges as the place for

responsibility for criminal conduct).

42. See JOEL FEINBERG, *DOING AND DESERVING* 272-92 (1970) (analyzing criminal law’s response to and accommodation of mental illness).

43. See FEINBERG, *supra* note 42, at 274-80 (outlining traditionally recognized criminal law notions regarding mental illness).

44. See FEINBERG, *supra* note 42, at 274-80 (exploring philosophical bases for criminal punishment and defenses).

45. See Descartes, *supra* note 3, at 522.

46. See generally David Hume, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING IN MORAL SUBJECTS* (1888).

47. See KANT, *supra* note 35, at 67.

48. See MILL, *supra* note 25, at ch. 1.

49. See generally W.E.H. LECKY, *HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE* (rev. ed., 1873).

individual identity and self-control, requires that the same rules of constraint that apply to conduct of the body *should not* govern mental activity. The reason is simple—to truly govern the mental realm is to deny personal identity, to produce a regiment of robots rather than autonomous thinking human beings, and, in the process, to undermine the justification for democratic institutions that find their support in enabling enlightened human autonomy.⁵⁰

I use “presumption” to qualify Mill’s commitment to liberty of thought and freedom of expression because he did not evoke the rationalism of Kant. As Mill himself says:

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.⁵¹

Here, Mill shows the empiricist side of his philosophical view as what would likely serve the long-term teleological interests of human beings seeking the good life by treating humans as potentially “progressive beings.” Still, as with the empiricist Hume before him, one finds a place for the mind as a thing separate from body, even if it is difficult to say how Mill would justify the mind. Mill is certainly suggesting that one makes a choice based on the utilitarian principle that “actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”⁵² Descartes’s earlier notion that mind and body were two uniquely different substances was one solution to how mind and body are distinguished. Another is the very different view that, regardless of how one judges body to exist, it is nevertheless the place where experience is made manifest.⁵³

People’s difficulty in interpreting what goes on in the mind of another further realizes mind as a private forum separate from body. Traditionally, one conveys one’s thoughts or makes them public through the spoken or written word, although some earlier philosophers of language believed thought itself required language.⁵⁴ This contributed to the idea that if one is not disposed to lie, one’s expressions will be acknowledged by most people to be an adequate,

50. See VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 83-103 (1991).

51. SAMAR, *supra* note 50, at 267-68.

52. See John Stuart Mill, *Utilitarianism*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 1, 194 (Max Lerner ed., 1961).

53. Descartes thought that strictly rational grounds had to justify both mind and body. See René Descartes, *Meditations on First Philosophy, Meditation 6*, in *CLASSICS OF PHILOSOPHY* 497, 519-20 (Louis P. Pojman ed., 2nd ed. 2003).

54. See SEARLE, *supra* note 33, at 8.

if perhaps incomplete, expression of one's thoughts and feelings.⁵⁵ Beyond this, expression of one's thoughts and feelings may also be presented symbolically through various art and other media, as when one paints a picture of an emigrant patriotically carrying an American flag in a Labor Day celebration or is shown on network news burning an American flag in a public protest of the Vietnam war.⁵⁶ More generally, an individual's body actions are usually considered indicators of true intentions, for example, when one says one thing but does another. In that instance, unless there is some special explanation for the inconsistency—perhaps that the individual is operating undercover—body actions generally belie intentional states. But even here, there is some room for doubt, as when one appears to send mixed signals one does not intend. Although mind and body are fundamentally different, within a certain range of error, the latter can sometimes manifest the former.⁵⁷ So, it is not necessarily the case that they be fully separate substances, as Descartes thought.⁵⁸

Still another way to see the mind/body distinction is in the specific context of the private/public distinction, which may more fully respect Mill's empirical orientation. This also follows John Searle's exploration of the way status functions work.⁵⁹ In this context, it is important to understand that the private is not in the first instance a claim against government or even against other persons to control personal actions but rather a reference to the inner sanctum of the mind, which operates largely independent from overt wants and desires. As such, the private is not opposed to the political, but to the physical. According to Searle, all powers of the person that are not specifically brute powers associated with unfree physical particles, arise by way of *status* functions.⁶⁰ These functions, in turn, are associated with linguistic elements that, on the one hand, help us to clarify our thoughts, while, on the other hand, providing recognition of desire-independent powers.⁶¹ For example, my recognition of George W. Bush as president is related to a status function I

55. I am allowing here for, at most, the possibility of the unconscious or, at least, mistakes of our own interests.

56. See Roberta Smith Favis, *Painting "The Red City": Oscar Bluemner's "Jersey Silk Mills,"* AMERICAN ART, Spring 2003, at 26-47; *The Flag-Burning Page*, <http://www.esquilax.com/flag/index2.html> (last visited Jan. 10, 2008).

57. I pause to note that the subconscious may be a mislabel for what is not a mental but actually a physical state of the brain. Although the subconscious is discussed in mentalistic language, including the language of dreams, it is not revealed through direct mental awareness because it is indeed *sub*conscious. But, I will leave that issue to those more versed in the psychological study of the unconscious.

58. See SEARLE, *supra* note 33, at 18-19.

59. Searle does not describe these functions to show that the mental ideas are unaffected by neurological brain functions as the traditional mind/body view would hold, but rather to state that notwithstanding their causal origin, there is an ontological separation that allows for rational decision-making not reducible to a "state of microelements, the neurons, etc. at that instant" of the brain. SEARLE, *supra* note 33, at 64-65.

60. See SEARLE, *supra* note 33, at 34.

61. See SEARLE, *supra* note 33, at 33-34.

accept independent from the fact that I may have desired a different result in the 2004 election.⁶² Here, we see that status functions operate on social facts to identify specific political powers, provided that we allow for a public/private distinction.⁶³ This does not mean that there is no connection between the external world of political bodies and the mental world of the individual, for status functions can operate only so long as they are accepted—that is, become part of the mental life.⁶⁴ However, such acceptance need not be by individual desire and may in fact be contrary to individual wants; for example, where one stops at a red light while on his way to watch the Superbowl, even though one might have preferred to run the light to see the opening kickoff.⁶⁵

This suggests that mind operates as a recognizer of outside authorities over various social goods separate from its own thoughts or personal desires as to what those goods should be or how they might best be brought about. Consequently, when one speaks of the great minds in history, it is not entirely accurate to assume a status function for the minds themselves, but rather for the works of art or science certain minds have produced, which other minds recognize.⁶⁶ Of course, it is common to hear phrases like “the great minds,” but that is because the products of these minds reflect creativity unseen elsewhere. One cannot see the mind itself as great since one does not see the mind at all, but only knows of mind either through self-awareness (Descartes’s famous “*Cogito ergo sum*”⁶⁷) or, in the case of others, by their achievements.

The mind as organizer of outside activities suggests that the inner workings of the mind’s own thoughts and desires, though clarified by linguistic elements, are not limited by any status those elements might convey. The mind may very well alter those status elements, for example, by suggesting a new paradigm to resolve a perplexing problem, whether it be a problem of personal self-worth as with Martin Luther King’s “I Have a Dream” speech, Newtonian understanding of nature as with Einstein’s General Theory of Relativity, or why arithmetic is

62. I accept the federal laws governing the election of the President, regardless of who that person might be.

63. See SEARLE, *supra* note 33, at 34-35.

64. See SEARLE, *supra* note 33, at 34-35.

65. I have in mind one’s decision to stop at a red light on a clear moonlit night, when there would be no danger, either physical or legal, to oneself or others in running it in order to get home to watch the opening of the big game or some other significant cultural event.

66. I understand the mind here to be an instrumental power much like the power to play the violin or an army’s power to control a territory. In contrast, I understand political power to fit a *power over relation* in which one person has power by virtue of some status over another. The distinction is not just because one has more troops on their side that one has power but because most agree that so and so is the person who can decide whose actions can be affected and in what ways. Though in complex democracies, the “so and so” may reference a complex separation of powers, the powers still exist by agreement. In essence this is a rule of recognition issue as noted by H.L.A. Hart, although it may be much more complicated and involve a number of varying moral principles, as noted by Ronald Dworkin. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 40-44 (1978); H.L.A. HART, *THE CONCEPT OF LAW* 57, 105-06 (1961).

67. René Descartes, *DISCOURSE ON METHOD; AND MEDITATIONS ON FIRST PHILOSOPHY* 19 (Donald A. Cress trans., Hackett Publishing 1980) (1637 & 1641).

incomplete as with Gödel's Incompleteness Proof, and many others.⁶⁸ This suggests that though status functions are creatures of minds, they operate inter-subjectively to constrain behavior and are therefore related more to a notion of the public world of body than the private world of mind.

IV. THE FIRST AMENDMENT AND THE MIND/BODY PROBLEM

A. *Freedom of Speech and the Constraints of Status*

Following Searle, I suggest that the ability of humans to be political animals comes about only because of our innate biological nature that allows us to enter into mutually cooperative agreements. I want to suggest further, notwithstanding the body connection, that it is the mind's capacity to operate by a desire-independent rational rule that lies behind such cooperative agreements. Kurt Baier has, I believe, argued correctly that because humans are rational egoists, they come to recognize that their interests will not always be served best by operating from "self-anchored," as opposed to "society-anchored," reasons.⁶⁹ Using the prisoners' dilemma and Hobbes's social contract theory as examples, Baier shows that reflective human decision-making will often determine that the best course of action is to engage in a socially cooperative activity over a strictly self-centered action in the hope of gaining a better result than might otherwise be obtainable.⁷⁰ Based on this analysis, humans will enter into agreements requiring outside enforcement to ensure the integrity of all parties to those agreements.⁷¹ But if this is the case, then mind as out-product of the biological instrument of the brain and instigator of our social discourse underlies all such social arrangements. This fits neatly into Searle's idea of human beings' basic biological ability to create status functions. It is also Hobbes's view that to ensure respect for social

68. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (exemplifying theme in science).

69. Kurt Baier, *The Rational and moral Order*, in *ETHICS: THE BIG QUESTIONS* 69, 80 (James P. Serba ed., 1998).

70. See BAIER, *supra* note 69, at 72-77. Kurt Baier uses the example of two prisoners in separate cells who cannot communicate, whom the prosecutor offers individually the chance to confess and implicate the other in return for no prison time if the testimony convicts the other prisoner, who then receives three years of prison time. If both confess, since their testimony against the other is irrelevant, they each get two years of prison time for saving the court the cost of a trial. However, if neither confesses, each would be convicted for only a lesser offense, as that is where the proof lies, and thus receive one year. Baier's point is that strictly self-interested-motivations would lead each prisoner to confess and thereby receive their second to worst result, rather than cooperate (were they able to communicate) and receive their second best result of one year. Their best result of no time is not likely if each acts purely out of self interest. In other words, they both are better off following society-anchored reasons (the society being the two of them) than strictly self-anchored motivations. See *id.*

71. Hobbes's social contract example fits here. By transferring our freedom to take what we want, when we want it, to a sovereign power, we gain collective security in return.

arrangements agreements with the power to enforce legal relationships must create political power.⁷²

Similarly, as mind can create social arrangements, it also may limit those arrangements to serve only the interests of a certain class or group as against all others. History is full of such examples, including many egregious human rights violations.⁷³ Still, a question arises as to whether this is a stable position for the mind over a long period of time. History has shown that regimes which are too authoritarian will not last indefinitely.⁷⁴ This may be because the various social, political, or economic reasons that lead the mind to develop status functions in the first place failed, in these instances, to require reassessment of those functions and to provide access to those outside of the authoritarian societies.⁷⁵ In other words, because the mind has the ability to create status functions, unless a set of rational desire-independent constraints with the capacity of making clear a further set of rewards or punishments also controls those functions in the long run, the slip to a strictly self-centered focus is probable.⁷⁶ This does not mean that if one is committed to truth that reason will not itself supply these constraints.⁷⁷ However, reason is rendered impotent when the will (another aspect of mental life) to carry forth its judgments is weak.⁷⁸ This is one reason why I find intuitive persuasiveness behind John Stuart Mill's harm principle.⁷⁹ By recognizing a realm of private behavior that is not merely the inward domain of consciousness, Mill circumscribes an area of human autonomy bounded by public authority with a criterion of separation

72. THOMAS HOBBS, *LEVIATHAN* 26 (C. B. Macpherson ed., Penguin Group 1983) (1651).

73. Examples range from violations of different groups' civil rights to work, own property, or be served in places of public accommodation—because of race, class, ethnicity, sex, or sexual orientation—to slavery, ethnic cleansing, and genocide.

74. Examples include the later Roman Empire, Hitler's Nazi Germany, Stalin's Soviet Union, Pol Pot's regime in Cambodia, and the Taliban in Afghanistan.

75. I have in mind the great war-revolutions of 18th century America and France, as opposed to the 20th century revolution of the Soviet Union, which was for the most part quite peaceful.

76. I say not *simpliciter* because I do not think democracy can be imposed on a people where there is no history or tradition of democratic government. The current state of Iraq provides a stark example.

77. See ALAN GEWIRTH, *REASON AND MORALITY* 63-103 (1978) (grounding human rights in rational voluntary purposive action).

78. See *supra* note 3; see also RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 44-49 (John Cottingham trans., Cambridge Univ. Press 1986) (1641). Descartes explains this weakness of will by the power of human choice via our desire or mistakes of reasoning to operate beyond the limitations of carefully worked out human understandings.

79. See JOHN STEWART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford Univ. Press 1991). Mill's harm principle reads:

[T]he sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

to know in which area one is operating at any given moment.⁸⁰ And so, following Mill, the mind—being the place where humans hold their most basic beliefs, desires, and thoughts—becomes the ideal place for human autonomy to operate. The body, because it finds engagement with others persons, becomes an appropriate object for the exercise of public authority.

This leaves open the question of splash-over, where aspects that seem closely related to the mind spill over to affect the status assigned to the body and vice versa. For example, First Amendment protections that govern our thoughts and speech, notwithstanding that we sometimes engage them for the purpose of persuading others, appear on the whole to be related more to our ability to think than to control either our own bodies or those of others. This contrasts with the excessive use of drugs, alcohol, and possibly prostitution or pornography if it is likely to create psychological dependencies. But even here, the examples are not conclusive as to which side of the border they necessarily fall and may be very fact dependent.

A similar argument could be made for preferring one candidate for President or thinking another should be removed from office, though clearly the right to such thoughts or expressions falls squarely within the First Amendment's strongest protection. This is because the splash-over concerns aspects of belief or other mental engagements such as thought or preference as compared to issues of control over physical bodies, including ourselves. Compare this to where one's actions are directed towards affecting bodies or the status societies assign to them—such as being a parent or married spouse—where regulation seems much more reasonable depending on the harm to be averted. Thus, arguably a Christian fundamentalist's view that same-sex marriage violates God's will cannot be prohibited, but neither can it be inscribed in law given that not all share the same view of God nor is there sufficient and credible evidence to suggest same-sex marriage is harmful in a non-belief mediated way.⁸¹

B. *Determining the Criterion of the Splash-Over Effect*

The totality of the circumstances determines whether the First Amendment protects a particular action or, if not, whether the state can legitimately regulate the action to guarantee equality. If the circumstances reflect a process of thought by which one arrives at, seeks out, or otherwise tries to validate one's

80. In my own work, *The Right to Privacy: Gays, Lesbians and the Constitution*, I provide an algorithm for Mill's use of "in the first instance" as a way to establish when an act is private or not. See SAMAR, *supra* note 50, at 66-67. That algorithm is if the mere description of the act without the inclusion of any additional causal theories does not suggest a conflict exists, a prima facie claim to privacy is justified. *Id.* When backed up with a definition of "basic interest" that does not include facts or social conceptions, a bright line separation is possible between the public and the private. *Id.* at 67-68.

81. See JUDITH JARVIS THOMPSON, *THE REALM OF RIGHTS* 253 (1990) (distinguishing belief-mediated from non-belief-mediated harm).

own thoughts, the splash-over is to the mind side of the mind/body divide. The corresponding First Amendment freedom should approach absolute. This does not mean one cannot debate with another or argue alternative positions, not only in the hope of confirming one's own thoughts, but also of convincing the other. It does mean, however, that the state cannot enforce regulations designed to restrict such engagements.

By contrast, a totality of circumstances suggesting a particular action is likely to affect the status of equal citizenship justifies regulation to promote equality unless there is a compelling state interest against such regulation. Regulation must either support some fundamental right or prevent infringements on interests the state has a compelling reason to protect. For example, a state meets the compelling interest standard in medical licensing where it bases regulation on educational requirements because it is necessarily protecting the health and autonomy of other persons. On the other hand, the state cannot classify medical license recipients based on race or gender because the mere classification would lessen overall human autonomy.⁸² In instances where truly equal circumstances prevail, as with a requirement for commercial establishments beyond a certain size to provide separate male and female bathrooms, it may be enough that the state has an important but not compelling reason for the classification and that no significant deprivation of rights occurs as a result.⁸³

Deciding where the splash-over effect lies in any particular case is highly fact-dependent. This, however, does not mean that any such decision should be thought indeterminate. A criterion for its determination is if the initial description of the action, without the inclusion of any additional facts or causal theories, suggests a conflict with another's interest.⁸⁴ In that instance, the splash-over effect falls on the side of equal status for those affected rather than on a purely cognitive aspect of thought.⁸⁵ Thus, commercial speech, which is often, and usually intentionally, related to status, can be more highly regulated than political or religious speech, which is less status-dependent in the usual sense of the term.⁸⁶ This is because commercial speech is not dependent

82. An interesting question arises with respect to who may marry. Does the state violate a fundamental right to marry when it restricts marriage to opposite-sex couples? Compare *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 962-63 (Mass. 2003), with *Hernandez v. Robles*, 855 N.E.2d 1, 6-8 (N.Y. 2006).

83. See *Lehr v. Robertson*, 463 U.S. 248, 266 (1983); *Craig v. Boren*, 429 U.S. 190, 197 (1976). An interesting problem arises in the transgender area when a pre-operative male wants to use the woman's bathroom or vice versa.

84. See SAMAR, *supra* note 50, at 66-68.

85. Here, I distinguish the cognitive aspect of thought from more emotive aspects; this is not to suggest that the latter might not be worthy of protection where a particular act is found to be offensive only to others. See *Cohen v. California*, 403 U.S. 15, 17 (1971). Rather, my point is to suggest that for more egregious acts, like the intentional or even negligent infliction of emotional distress, law can provide relief.

86. For example, to a conservative Catholic, the Pope's proclamations on questions of faith and morals, when issued *ex-cathedra*, are infallible, suggesting that they bear an absolute, though certainly non-objective status compared to a more general encyclical on the same question. Still, they have no greater objective status,

merely on the content of an idea but also on other symbols previously agreed to within the society as delineating areas for greater influence or authority.⁸⁷

A related but somewhat different argument pertains to corporations having non-natural thoughts and ideas. Peter French, following Donald Davidson's analysis, describes corporations as intentional agents and argues that they act with a degree of moral autonomy that cannot be reduced merely to the choices of individual decision-makers.⁸⁸ Corporations can take actions that individuals cannot, and consequently, there is a separate moral responsibility assignable to the corporation that may not be the same responsibility assignable to the individual decisions of its shareholders or even its board of directors.⁸⁹ Corporations may therefore be held legally and arguably even morally accountable for their actions.⁹⁰

This is not to say that the legal and moral rules being applied are not the products of individual moral agents. It does, however, mean that at the point where the law recognizes corporate status, corporations may make claims not dissimilar from those of natural moral agents. Natural individuals may engage in a level of rationality based on whether their decision-making advances the purposes of the corporation. I described above a model for distinguishing a splash-over effect between mind and body and a similar one may apply to corporations. The totality of circumstances in which the corporation's decision-making occurs determines the direction of this splash-over effect. If the totality of circumstances suggests a greater effect on thoughts and ideas, the legal result should be greater protection than if the splash-over effect is more directed to current economic or social status in society. The only difference is that the corporation's mental status is artificial as opposed to natural.⁹¹

V. THREE FIRST AMENDMENT CASES

Having thus described the relevance of the mind/body problem to the First Amendment, let us consider *Jaycees*, *Hurley* and *Dale*, where First Amendment freedom and Fourteenth Amendment equality were arguably in conflict, to see

because unlike a marketing strategy, the results will have no effect beyond the immediate group that accepts them. Whereas in commercial marketing, the result may be that products or services previously available are no longer provided.

87. Here, we see a justification for the higher standard of actual malice to prove defamation or invasion of privacy for public figures because they have a measurably greater influence on the society at large by virtue of their access to the media. In the case of public officials, their authority stems from the offices they hold by virtue of public acceptance.

88. See Peter French, *The Corporation as a Moral Person*, 16 AMERICAN PHILOSOPHICAL QUARTERLY 207-15 (1979), reprinted in ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH 120, 120-29 (Thomas Donaldson & Patricia H. Werhane eds., Prentice Hall, 4th ed., 1993).

89. French, *supra* note 88, at 128-29.

90. French, *supra* note 88, at 129.

91. The archetypal example is the creation of a robot with sufficient artificial intelligence to make decisions on its own.

if the mind/body distinction helps to elucidate the justices' reasoning in deciding these cases.

A. *Roberts v. United States Jaycees*⁹²

The United States Jaycees (Jaycees) was a nonprofit membership organization founded in 1920 as the Junior Chamber of Commerce. Its mission, as set forth in its bylaws, was to pursue

such educational and charitable purposes as will promote and foster the growth and development of young men's civic organization in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.⁹³

Jaycees restricted regular membership to young men between the ages of fifteen and thirty-five.⁹⁴ Women and older men could qualify for a non-voting associate membership.⁹⁵ Under the bylaws of the national Jaycees, state organizations and local chapters could be created, provided their purposes were "similar to and consistent with those of the national organization."⁹⁶ Nevertheless, for approximately ten years, beginning in 1974 and 1975, the Minneapolis and St. Paul chapters, respectively, had been admitting women as regular voting members, despite the fact that granting women full membership violated the national organization's rules.⁹⁷ After repeated unsuccessful attempts by the national organization to get these chapters to end this practice, the national organization advised both chapters in December 1978 that their charters would be revoked. Thereafter, members of both chapters filed charges of discrimination with the Minnesota Department of Human Rights, alleging that the national organization's bylaws violated the Minnesota Human Rights Act. The Minnesota Human Rights Act provided, "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."⁹⁸ The national organization then brought a

92. 468 U.S. 609 (1984).

93. *Id.* at 612-13.

94. *Id.* at 613.

95. *Id.*

96. *Roberts*, 468 U.S. at 613 (quoting bylaws).

97. *Id.*

98. *Roberts v. United States Jaycees*, 468 U.S. 609, 614-15 (1984) (citing MINN. STAT. § 363.03 subd. 3

separate case in federal district court seeking declaratory and injunctive relief against enforcement of the statute. The case ultimately found its way to the United States Supreme Court after a series of decisions.⁹⁹

Initially noting that its prior decisions protecting freedom of association had followed two distinct paths, the Supreme Court attempted to determine whether the association's claim in *Roberts* fell within the purview of either set of earlier cases.¹⁰⁰ The distinct sets were those protecting intimate associations and those the Court had held necessary to protect other First Amendment rights, such as speech, assembly, redress of grievances, and the free exercise of religion.¹⁰¹ Justice Brennan noted that personal affiliations falling under the first set of cases "are those that attend the creation and sustenance of a family."¹⁰² He further noted that such relationships "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."¹⁰³ The Court held that because the Jaycees "are large and basically unselective groups," they would not merit the protection afforded under this line of cases.¹⁰⁴

Justice Brennan's opinion next considered whether the Jaycees might fall under the second line of cases. Here, the Court began by noting that "[a]n individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."¹⁰⁵ However, the Court then considered its concern for equal status based on gender: "The right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by

(1982)). The conflict with equality arises here because of the existence of a statute affecting the private sector, since the Fourteenth Amendment's equal protection clause is more a limit on state action and does not directly apply to the private sector. However, Minnesota, in adopting the Human Rights Act, was operating within its constitutional authority under both the federal Fourteenth Amendment and its state constitution.

99. *Id.* at 617. The series began with the Minnesota Department of Human Rights ordering the national organization to cease further interference with the Minnesota affiliates' admissions of women. *Id.* at 616. A federal court order followed, referring the case to the Minnesota Supreme Court, where it was determined that the Jaycees was a place of public accommodation within the meaning of the statute. *Id.* The national organization then amended its federal complaint, challenging the Minnesota Supreme Court's interpretation as constitutionally vague and overbroad, but the district court did not agree. *Id.* The Eighth Circuit reversed the district court's holding for the chapter affiliates on the ground that because the organization advocated for political and public causes, it had First Amendment freedom to select its membership. *Id.* at 616-17. The issue before the Supreme Court was whether the Jaycees' First Amendment right to freedom of association barred Minnesota's interference with its membership selection on the basis that the membership selection afforded unequal status to men and women. *Id.* at 612.

100. *Id.* at 622.

101. *Id.* at 617-18.

102. *Roberts*, 468 U.S. at 619.

103. *Id.* at 620.

104. *Roberts v. United States Jaycees*, 468 U.S. 609, 621-22 (1984).

105. *Id.* at 623.

regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹⁰⁶ The Court further held: “in upholding Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, we emphasized that its fundamental object . . . was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”¹⁰⁷ Applying the same status analysis to the Jaycees, the Court concluded:

[T]he State has advanced those interests through the least restrictive means of achieving its ends. Indeed, the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of association. . . . There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.¹⁰⁸

In essence, the Court’s approach distinguished the mental aspects of the Jaycees’ proselytizing from the social status that followed membership in the organization. The former clearly involves concerns for advocacy and the content of the organization’s message, which the national organization felt would be enhanced by restricting membership only to males.¹⁰⁹ The latter concerned the ability to set the agenda for carrying out those avocations as full voting members. The nature of one’s body being female or the distinct actions females and males can perform did not by itself change the organization’s purpose of advocating for “intelligent participation by young men in the affairs of their community, state and nation.”¹¹⁰ Moreover, “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”¹¹¹ Thus, it is apparent that a distinction based on the mind/body distinction helps to make sense of the Court’s holding in this case, at least where status functions are involved.

Nothing in the mere description of a woman joining the Jaycees suggests a conflict with any basic belief, ideal, or goal of the Jaycees. This is not the case of the atheist seeking to join a religious denomination as a fully participating member where the individual’s beliefs and the organization’s professed dogma

106. *Id.* at 623.

107. *Id.* at 625 (citing *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 250 (1964)) (internal citations omitted).

108. *Roberts*, 468 U.S. at 627.

109. *Id.* at 627 (discussing Jaycees’ argument regarding women’s admission as members).

110. *Roberts v. United States Jaycees*, 468 U.S. 609, 613 (1984).

111. *Id.* at 628.

would be in obvious conflict. Women are equally capable of espousing the Jaycees' national stance of advocating on behalf of young men because sex alone does not necessitate any particular social outlook.¹¹² Insofar as the conflict involves sex discrimination, the specific burden the Jaycees must meet to be allowed to continue their exclusionary practice at least requires a showing that an important and substantial aspect of their message will be burdened if the organization admits women members.¹¹³ On the face of all the relevant evidence presented, it was clear that the national organization would not be able to meet this requirement.

In a concurrence written by Justice O'Connor, she criticized the majority for failing to pay attention to the commercial opportunities afforded men by membership in the Jaycees. According to O'Connor, "[a]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."¹¹⁴ O'Connor viewed commercial associations as already having diminished First Amendment protections because of the different social and economic opportunities markets may afford to membership in various groups. She worried that the majority's position "raises the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."¹¹⁵ This too follows the idea that the commercial world is one in which bodies compete with one another for opportunities associated with various status functions society openly assigns to these groups, including opportunities for wealth, social status, and prestige. Such opportunities constitute then indicia for deciding the direction of the splash-over effect of the mind/body relation, which in this case the Court correctly found, as shown above, to be toward the protection of body.

*B. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*¹¹⁶

March 17th is the day Bostonians celebrate the 1776 evacuation of British troops and Loyalists and the city's Irish heritage in the annual St. Patrick's Day Parade.¹¹⁷ Initially, the City Council of Boston sponsored many of the day's celebrations.¹¹⁸ Beginning in 1947, however, the city has granted a permit to the South Boston Allied War Veterans Council to organize and conduct the St.

112. For example, despite their physical differences, women and men alike are on both sides of the debates regarding reproductive choice and the roles of women in religious societies.

113. *Roberts*, 468 U.S. at 627.

114. *Id.* at 636 (O'Connor, J., concurring).

115. *Id.*

116. 515 U.S. 557 (1995).

117. *Id.* at 560.

118. *Id.*

Patrick's Day/Evacuation Day parade.¹¹⁹ The Council has not been particularly selective over its history, but it has prohibited the Ku Klux Klan and ROAR (an anti-busing group) from marching.¹²⁰ Since 1992, gay, lesbian, and bisexual descendants of Irish immigrants (GLIB) have tried to march in the parade *under their own banner*.¹²¹ Their goal was to "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade."¹²²

Although the Council refused to permit the group to march from 1992 to 1995, a state court in 1992 ordered that the GLIB group be included in the parade.¹²³ In 1993, another state court ruled, based on alleged violations of the state and federal constitution and Massachusetts public accommodations law, that GLIB's inclusion in the parade did not "trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would requir[e] focus on a specific message, theme or group absent from the parade."¹²⁴ In other words, it would not be enough just to have a parade. The parade would have to be geared toward espousing a particular message or theme that would be offended by merely including the gay group. The Supreme Judicial Court of Massachusetts affirmed the decision.¹²⁵ Thereafter, the United States Supreme Court granted certiorari "to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' choosing violate[d] the First Amendment."¹²⁶

Interestingly, at the Supreme Court stage, lawyers for GLIB did not press any First Amendment or equal protection claims on behalf of their clients. They likewise did not claim there was state action in organizing the parade, even though the city had up through 1992 allowed its official seal to be used and, in every year subsequent, issued an official parade permit.¹²⁷

Following the "requirement of independent appellate review" of findings of fact by a state court where federal conclusions of law might be at stake, Justice Souter, speaking for a unanimous Supreme Court, determined that "[r]eal [p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for

119. *Id.* at 560-61.

120. *Hurley*, 515 U.S. at 562.

121. *Id.* at 561.

122. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 561 (1995).

123. *Id.*

124. *Id.* at 563 (internal quotations omitted).

125. *Id.* at 563.

126. *Hurley*, 515 U.S. at 566.

127. *Id.* at 561. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 561 (1995).

communication and consideration.”¹²⁸ The Court also concluded that GLIB’s “participation in the parade was equally expressive.”¹²⁹

There was no claim that the organizers were trying “to exclude homosexuals as such.”¹³⁰ Rather, the concern was that “[s]ince every participating unit affects the message conveyed by the private organizers, the state court’s application of [the public accommodation law] produced an order essentially requiring petitioners to alter the expressive content of their parade.”¹³¹ GLIB had sought to march under its own banner in the parade. Because “all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.”¹³² This latter point is important because it undercuts the lower court’s determination that protected expression requires a “specific message, theme or group.”¹³³ Here, “the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.”¹³⁴

In this latter respect, the Court clearly noted that the situation would be different if GLIB had shown that the Council enjoyed “the capacity to silence the voice of competing speakers, as cable operators do with respect to program providers who wish to reach subscribers.”¹³⁵ In that instance, there are both limited frequencies and well-recognized means in the form of disclaimers to “disavow any identity of viewpoint between themselves and the selected participants.”¹³⁶ Although the parade in the present case may attract more attention than most, it was hardly GLIB’s claim that exclusion from marching under its own banner would prevent its message from being heard, perhaps in a different context, such as another parade.¹³⁷ Consequently, Boston’s public accommodations law could not force the organizers to include GLIB, marching under its own banner, in their parade because this would violate the freedom of speech of the parade organizers.

The analysis of the mind/body problem may clarify the distinguishing factor between *Hurley* and *Jaycees*. The factor lies in the splash-over effect caused,

128. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (quoting SUSAN G. DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH CENTURY PHILADELPHIA* 6 (1986)) (internal citations omitted).

129. Its very purpose for marching was “to celebrate its members identity as openly gay, lesbian and bisexual descendents of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.” *Id.* at 570.

130. *Id.* at 572.

131. *Id.* at 572-73.

132. *Hurley*, 515 U.S. at 572-73. (internal citations and quotations omitted).

133. *Id.* at 563.

134. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

135. *Id.* at 578 (internal quotations and citations omitted).

136. *Id.* at 576 (O’Connor, J., concurring) (internal citations omitted).

137. *See id.* at 579-80.

at least in part, by the failure of GLIB's counsel to claim that its group had a unique expression that could only be understood in the context of *this* parade. Moreover, GLIB's counsel failed to argue that state action was present where the city of Boston made available its public streets and thoroughfares to this particular group, and at least until 1992, the parade bore the official city seal. As a result of the complicity of city officials, GLIB was denied equal protection of the laws. This conclusion also follows from a failure to show that GLIB's claim would not impair, on its face, any view of the organizers since up to this point none had been stated. However, by failing to raise the state action question, GLIB's attorneys left open the possibility that the organizers would argue that they really did not want to make GLIB's banner a part of their message. Thus, it was the failure to protest the issue being framed primarily as involving the mental activity of the organizers of the parade combined with the failure to raise the issue of state action that opened the door to the parade essentially being considered a private march—much like a protest march.¹³⁸ As such, it allowed the organizers to claim the parade was meant to serve only certain messages, perhaps many, but not all messages.

The more interesting question would be how a mind/body analysis might have resolved the case differently had these concessions by GLIB's counsel not been made. Of course, one may never be certain when dealing with a question of interpretation. Still, had these concessions not been made, the splash-over effect between mind and body would have had to be accessed by a much closer analysis of the given facts affecting the status of those who participated in the Boston parade. Some important factors that might have influenced the Court, in addition to mere numbers of people who actually watch the parade and thereby become aware of any message, include the following: whether the public viewed the parade as a city-sponsored celebration of respect for parade participants as opposed to a private celebration allowed by the city. This may be determined by who was expected to participate in the parade, such as whether the mayor, city councilors, and city officials were *expected* to participate. Was the parade meant to express the dogmas of a particular religious group of Catholics, perhaps as expressed by the name *St. Patrick's Day* Parade, or, was it more widely viewed as a day of *public celebration*, as expressed by the somewhat lesser known *Evacuation Day* Parade? Was the parade connected to events surrounding the culmination of the American Revolution in Boston and to what extent was this known by those attending the parade or commented upon by the local press? What messages did the various commercial participants of the parade convey to the citizens along the parade

138. Because the trial had found, contrary to the claim of the organizers, no specific expressive element by the parade organizers, the Supreme Court made an independent investigation of the record to determine what expressive content there might have been on the part of petitioners and respondents. See *Hurley*, 515 U.S. at 567. However, no similar investigation of state action seems to have been undertaken from the record. *Id.*

route, and how was failure by both commercial and noncommercial organizations to participate in the parade viewed by the general public in Boston? Did the public even care? Any one of these factors may not be decisive on its own. But the nature of this parade, its quasi-public endorsement, and its mere size and attraction suggests that these factors needed to be taken into account. Had the concessions by counsel for GLIB not been made, it is by no means clear that the Court would have decided this case as it did.

C. Boy Scouts of America v. Dale¹³⁹

James Dale joined the Cub Scouts at age eight and in 1981 became a Boy Scout, which he remained until he was eighteen, finishing in 1988 with the rank of Eagle Scout, one of Scouting's most prestigious awards.¹⁴⁰ In 1989, Dale applied for and was approved to be assistant scoutmaster of Troop 73.¹⁴¹ Thereafter, he attended Rutgers University where he first acknowledged that he was gay.¹⁴² In 1990, Dale attended a seminar on the psychological needs of lesbian and gay teenagers where he was interviewed by a local newspaper regarding his advocacy of role models for gay teenagers.¹⁴³ The article was published in early July of that year and shortly thereafter Dale received a letter from Monmouth's Council executive James Kay revoking his adult membership to the local Boy Scouts of America (BSA) chapter.¹⁴⁴ On further inquiry as to why his membership was revoked, Kay responded in a second letter that "the Boy Scouts specifically forbid membership to homosexuals."¹⁴⁵ Dale subsequently filed a complaint against the Boy Scouts alleging violations of New Jersey's law prohibiting discrimination based on sexual orientation in places of public accommodation. After the case worked its way through the New Jersey courts, the United States Supreme Court granted certiorari on the question of whether the New Jersey statute had violated the Boy Scouts's right to freedom of association.¹⁴⁶

Chief Justice Rehnquist, writing for the majority of the Court and in favor of the Boy Scouts, noted that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."¹⁴⁷ The Court further noted that "freedom of association . . .

139. 530 U.S. 640 (2000).

140. *Id.* at 644.

141. *Id.*

142. *Id.* at 644-45.

143. *Dale*, 530 U.S. at 645.

144. *Id.*

145. *Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000) (internal quotations omitted).

146. *Id.* at 647.

147. *See id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotations

plainly presupposes a freedom not to associate.”¹⁴⁸

The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. [It can] be overridden “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.”¹⁴⁹

The Court went on to hold that the Boy Scouts were engaged in expressive association.¹⁵⁰ The trial record showed that

[i]t is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:

Scout Oath and Law:

On my honor I will do my best

To do my duty to God and my country

and to obey the Scout Law;

To help other people at all times;

To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is:

Trustworthy Obedient

Loyal Cheerful

Helpful Thrifty

Friendly Brave

Courteous Clean

Kind Reverent.¹⁵¹

omitted).

148. *Id.* at 648 (internal quotations omitted).

149. *Dale*, 530 U.S. at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal citations omitted).

150. *Id.* at 657.

151. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49 (2000).

The record further showed that “[t]he Boy Scouts seeks to instill . . . these values by having its adult leaders spend time with youth members, instructing and engaging them in activities like camping, archery, and fishing.”¹⁵²

The Court noted that “[t]he Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms ‘morally straight’ and ‘clean.’”¹⁵³ Although the Boy Scout Oath and Law does not specifically mention sexuality or sexual orientation, the Boy Scouts nevertheless asserted that “it teaches that homosexual conduct is not morally straight” and that it does “not want to promote homosexual conduct as a legitimate form of behavior.” On this evidence alone, the Court accepted the Boy Scouts’s assertion of what message it wanted to send: “[w]e need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality.”¹⁵⁴ The majority further noted that “[a]s 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.”¹⁵⁵ Claiming adherence to its earlier decision in *Hurley*, the Court stated, “As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts’[s] choice not to propound a point of view contrary to its beliefs.”¹⁵⁶

With respect to the claim that the Boy Scouts allowed heterosexuals to serve as assistant scoutmasters even if they disagreed with the anti-homosexual policy, the majority of the Court found that “[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts policy.”¹⁵⁷ The Court concluded that the New Jersey “requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct.”¹⁵⁸ The Court therefore held that the First Amendment “prohibits a state from imposing such a requirement through the application of its public accommodations law.”¹⁵⁹

The majority’s seeming indifference to the splash-over effect toward status that accompanies membership in the Boy Scouts gave rise to Justice Stevens’s

152. *Id.*

153. *Id.* at 650.

154. *Id.* at 651 (internal citations and quotations omitted).

155. *Dale*, 530 U.S. at 653.

156. *Id.* at 653-54.

157. *Boy Scouts of America v. Dale*, 530 U.S. 640, 655-56 (2000).

158. *Id.* at 659.

159. *Id.*

poignant dissent, joined by Justices Souter, Ginsburg, and Breyer. Of interest is Justice Souter's presence on this side of the issue given his authorship of the unanimous opinion in *Hurley*, which found the GLIB's position to interfere with the organizers of the Boston parade's intended message. However, Stevens's dissent explains this. It starts by focusing on the First Amendment requirement that the Boy Scouts show that the mere inclusion of Dale as an assistant scoutmaster "would impose any serious burden, affect in any significant way, or be a substantial restraint upon the organization's shared goals, basic goals, or collective effort to foster beliefs."¹⁶⁰

Justice Stevens found it beyond remarkable that "the majority insists that we must give deference to an association's assertions regarding the nature of its expression and we must also give deference to an association's view of what would impair its expression."¹⁶¹ The majority's reasoning astonished Justice Stevens.¹⁶²

According to Justice Stevens, the majority relied on *Hurley* for the proposition that "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinct . . . message, and, accordingly, BSA is entitled to exclude that message."¹⁶³ However,

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His

160. *Id.* at 683 (Stevens, J., dissenting). The dissenting opinion went on to suggest that

The evidence before this Court makes it exceptionally clear that [Boy Scouts of America] has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law—and accompanying definitions—are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality.

Id. at 684.

161. *Dale*, 530 U.S. at 685 (Stevens, J. dissenting).

162. "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." *Id.* at 686 (Stevens, J. dissenting).

To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand.

Id. at 687.

163. *Boy Scouts of America v. Dale*, 530 U.S. 640, 692 (2000) (Stevens, J. dissenting) (quoting *id.* at 655-56 (majority opinion)).

participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message.¹⁶⁴

Clearly, Justice Stevens and the other dissenters who joined him gave ground to the view that while the First Amendment protects liberty of the mind, other provisions, such as the Fourteenth Amendment and state laws that have evolved from it, which affect the private sector, provide distinct protections for those granted the status of membership in the Boy Scouts, especially where state sponsorship may be involved. The splash-over occurs because the BSA sought to exclude an assistant scoutmaster based on a view of his lifestyle. The BSA may have only recently adopted this view without any obvious relation to a prior message, or without a logical connection definitive of its organizational mission. The problem, as Justice Stevens and the other dissenters correctly stated, is that this approach to setting forth the scope of a constitutional right provides no boundaries between freedom of association and a state's compelling interest to ensure status equality among its citizens where the potential for broader social benefits or burdens might be at stake. One consequence is that one could always, by way of announcing a belief, splash over whatever boundary for status protection might be found.

Following this analysis, Dale's adult membership in the BSA did not on its face suggest any conflict with the policies, oath, or law of the BSA. It only became problematic when the national body, via its court pleadings, made clear that it was, at least at that point, interpreting its mission statement, oath and law to prohibit homosexuality among its members. Prior to that time, homosexuality, as Justice Stevens rightly pointed out, had not been an issue. Where, as here, laws affecting the private sector and made in furtherance of equal protection, where there is state involvement, are worthy of judicial cognizance. The majority's unwillingness to examine the background facts, at least to determine the amount of discrimination that could be apportioned to state involvement, is clearly erroneous.¹⁶⁵

164. *Id.* at 694-95 (Stevens, J. dissenting).

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.

Id. at 687.

165. Its federal charter and various state and local sponsorships clearly indicate that the BSA is an organization substantially involved with the state.

That is why *Hurley* is not only unhelpful to the Court's opinion in *Dale* but is actually contrary to its essential holdings. Recall in *Hurley* that the Court took note of what GLIB *did* and *did not* claim both at oral argument and in its briefs. This was a clear throw to the idea that if sponsors of the St. Patrick's Day parade supported by state action, and especially by a form of state action that because of the parade's organization and public view might have tied the state to support of discrimination, the outcome might likely have been different. The more obvious reason why *Hurley* supported the position of the sponsors was that GLIB's counsel never raised these issues and the Court has an obligation to take the record as given.¹⁶⁶

By contrast, *Dale* acknowledged the public issues of sponsorship of the Boy Scouts and their long history and federal charter. Therefore, the Court's failure to investigate what legitimately could be the BSA's mission given its state sponsorship—let alone whether Dale's presence would have diminished that mission—was clear assent to what can only reasonably be described, when compounded with various stereotypical views, as prejudice against gay persons. It certainly was not the analysis that the mind/body distinction offered here would suggest.

That view explains better than any other both Justice Stevens's angry dissent and why so many of the justices who decided *Hurley*, including its author, Justice Souter, sided with him.¹⁶⁷ It also suggests that the holding in *Dale* may not survive very long. As I think Justice Stevens's dissent correctly points out, the majority opinion leaves too much leeway to undercut the antidiscrimination laws of the United States.

VI. OTHER FIRST AMENDMENT CASES

I suggest that the approach offered here provides a clearer and more sustainable understanding of general First Amendment law than the views which elevate political speech, but then run into the difficulty of not providing adequate grounds for why we might want to protect commercial and other forms of speech, including speech on the internet.¹⁶⁸ Especially given the Court's elevation of commercial speech during the 1980s, an alternative approach finding common ground in all these forms of expression should prove quite useful.¹⁶⁹ To say that it is the political nature of the speech that makes it important presupposes a very broad view of the political. For example, are

166. See FED. R. CIV. P. 56(e).

167. The point here is not to assert that application of the mind/body distinction adds new content to the specific criticisms raised by Justice Stevens and others. Rather, it is to suggest that application of the mind/body distinction provides a clear rational unity for understanding limitations on constitutional freedoms.

168. See *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (making political speech core of First Amendment).

169. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 571 (1980) (holding public utility's promotional advertising was protected commercial speech notwithstanding a local monopoly over sale of electricity).

labor negotiations political?¹⁷⁰ Moreover, the fact that certain types of speech may be political does not in itself explain why a certain type of speech is more worthy of protection than economic, social, or even private speech.¹⁷¹ To say speech ought to be protected because it is a more direct avenue to the mind is simply to say that language bears a strikingly similar relation to ideas.¹⁷² That is because its meaning is not a property of some script but of our inter-subjective understanding over to what the script refers.¹⁷³ Indeed, the ability of language to symbolize an idea explains why commercial speech, along with religious, cultural, and private speech, might warrant some protection from the state.¹⁷⁴ Language also opens the door in a non-question-begging way to a more definite separation of mere thought from status and shows why some speech is unprotected. Examples include slander or libel (which implicate status), fighting words (which are calculated to affect status), and calls for crime or insurrection that present a “clear and present danger” to status-conferring institutions.¹⁷⁵ The area of obscenity might be included, although here it seems harder to find a specific status violation, except where a particular abuse is perpetrated against a vulnerable group, such as women or children.¹⁷⁶

Next, I consider how my analysis fits the prevailing hierarchy of First Amendment protections for speech that is viewpoint-based, content-based but viewpoint-neutral, speech-based and content neutral, and to speech based on neutral rules of general applicability. I will address these matters separately in respect to restrictions on speech and compulsions of speech. Although I will mention specific case holdings, I intend the list to be a general indication of how well the theory fits within traditional First Amendment thinking.

170. See generally W.J. Dunn, Annotation, *Construction and Application of the “Free Speech” Provision of the Labor Management Relations Act (Taft-Hartley Act) Relating to Expression of Views Etc.*, 25 A.L.R.2d 417 (1954).

171. See *Garcetti v. Ceballos*, 547 U.S. 410, 421-23 (2006) (holding no First Amendment protection attached to public employee’s statements made pursuant to official duties).

172. *Pacific Gas & Electric Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (portraying associations as contributing to discussion of ideas fostered by First Amendment).

173. *Id.*

174. See *Central Hudson Gas*, 447 U.S. at 561-62 (discussing limited constitutional protection of commercial speech). “The First Amendment’s concern for commercial speech is based on the informational function of advertising.” *Id.*

175. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942); *Dennis v. United States*, 341 U.S. 494, 505 (1927).

176. See generally, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). A less controversial aspect of this theory is the state’s power to prohibit the exhibition, sale, or distribution of child pornography because children under the age of sixteen are not mature enough to consent. See *New York v. Ferber*, 458 U.S. 747, 773 (1982); see also *Paris Adult Theatre I*, 413 U.S. at 107 (reasoning state has “substantial interest in precluding . . . flow of obscene materials even to consenting juveniles”). In *Ferber*, the Court held that a state permissibly may prohibit the dissemination of child pornography. See *Ferber*, 458 U.S. at 773.

A. *Restrictions on Speech*

Regarding restrictions on speech, the Supreme Court has held a statute making it a crime to burn or desecrate the American flag violates the First Amendment, but a ban on cross-burnings with the intent to intimidate did not violate the First Amendment.¹⁷⁷ Whereas the latter case calls into question the equal citizenship of the recipient of the hate message, the former case calls to public attention the views of some regarding the judgments of government officials. Similarly, a conviction for incitement will be sustained only if there is present an imminent harm accompanied by a strong probability of illegal action and intent to break the law.¹⁷⁸ Speech that merely provokes a hostile audience will not give rise to a restriction “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”¹⁷⁹ Where the speech merely involves provocative or distasteful language not directed against any person or group such that it would likely provoke a violent response, it must remain free from prohibition.¹⁸⁰ By contrast, it is constitutional for the government to use private speakers to convey an approved message for viewpoint based funding decisions.¹⁸¹ However, a public university that generally provides funds for the printing of student publications cannot refuse funds to a Christian student group publishing a paper just because that group represents a particular religious viewpoint.¹⁸² Likewise, the state can neither limit a property tax exemption for veterans by requiring a signed promise not to advocate the overthrowing of the United States government, nor prohibit convicted criminals from profiting by selling their stories to the media, as such prohibition would unnecessarily limit individual freedom of speech, including the public’s chance to gain more insight into what might have happened.¹⁸³

Each of these cases represents the idea that, generally, the state cannot limit purely mental beliefs. An exception arises where government seeks to convey its point of view and is the source of the funding, in which case it is the beliefs of the government operating like any organization, paying for its beliefs to be fostered, that control. But this would stand to reason given that the mental life of private persons, including corporations and governmental institutions

177. Compare *United States v. Eichman*, 496 U.S. 310, 312, 319 (1990) (striking down act prohibiting flag burning as unconstitutional), with *Virginia v. Black*, 538 U.S. 343, 366-67 (2003) (upholding law prohibiting burning of cross).

178. See *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969) (rejecting argument that “clear and present danger” doctrine applies to First Amendment).

179. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

180. *Cohen v. California*, 403 U.S. 15, 18 (1971).

181. See generally *Rust v. Sullivan*, 500 U.S. 173, 173-93 (1991).

182. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822-23, 845-46 (1995).

183. See *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123 (1991) (determining New York City’s “Son of Sam” law restricted free speech); see also *Speiser v. Randall*, 357 U.S. 513, 514-15, 529 (1958) (holding university restricted group’s free speech).

operating like private organizations, do not substantively affect the interests of others.

Turning next to content-based, viewpoint-neutral restrictions, government cannot draw content-based distinctions identifying a particular set of words or symbols as prohibited *per se*.¹⁸⁴ Government can, however, limit the applicability of a tax exemption to non-lobbying nonprofits without restricting the free speech of those groups which choose to engage in lobbying activity.¹⁸⁵ In the context of the Fourteenth Amendment, leasing a public parking lot to a private restaurant that would not serve African Americans was impermissible state action supporting a racially-based, status-discrimination.¹⁸⁶ But a local school board cannot fire a public school teacher for sending a letter critical of school officials to a local newspaper, absent a showing that the letter contained knowingly false statements.¹⁸⁷ Similarly, the Federal Communications Commission cannot prohibit noncommercial educational stations from editorializing.¹⁸⁸ In these instances, the governmental limitation did not attempt to restrict a point of view but rather sought impermissibly to limit public debate over certain topics and ideas. Government can regulate speech that occurs on properties it designates as public forums that are traditionally recognized as such, for instance sidewalks and parks. The restrictions are permissible so long as they are content-neutral, narrowly drawn, and designed to serve some important governmental interest, such as getting people on and off the property safely and efficiently.¹⁸⁹ The First Amendment's explicit protection of freedom of speech reflects Mill's view that speech is "almost of as much importance as thought itself" because free discussion in open market places of ideas establishes beliefs and changes viewpoints.¹⁹⁰ It does not seem to matter much to Mill whether the viewpoints be political, commercial, social, or economic.¹⁹¹

The First Amendment provides less protection to matters that are speech-based but content neutral than to matters regarding status, to which it affords

184. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (discussing First Amendment prohibition on content based speech restriction).

185. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (holding non-conveyance of tax exempt status not violative of right to free speech). The Court held that in not granting tax exempt status, the Congress was not limiting speech but rather refusing to pay for lobbying activity with public funds. *Id.*

186. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717 (1961).

187. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (holding school board's action violated First Amendment).

188. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984).

189. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (striking down city ordinance prohibiting picketing within 150 feet of schools). The Court reasoned that the ordinance's exemption of peaceful labor picketing alone was impermissible, but the Court clarified that not all forms of picketing must be allowed. See *id.* at 94, 98.

190. See MILL, *supra* note 25, at 268.

191. See MILL, *supra* note 25, at 268.

greater protection. Strict scrutiny protection is afforded to viewpoint and content-based speech; on the other hand, a sufficiently important reason can serve to restrict speech that is not content-based. Hence, a city does not violate the First Amendment when it requires those using its band shell to employ only city sound engineers and equipment, as this might benefit the taxpayer against harm to expensive equipment.¹⁹² Similarly, Election Day restrictions prohibiting content-based political speech within 100 feet of a polling station do not violate the First Amendment, as the regulation appears aimed at eliminating voter coercion at polling places.¹⁹³ On the other hand, a city cannot pass an ordinance barring religious groups from soliciting door to door.¹⁹⁴ Even a privately owned town cannot bar Jehovah's witnesses from distributing their literature.¹⁹⁵ These restrictions would unjustifiably inhibit free speech, whereas a less restrictive (and presumably constitutional) statute would limit only intrusions where the dweller had put out a sign stating "No Solicitors" or "Do Not Disturb."¹⁹⁶ Similarly, a city cannot prohibit the distribution of leaflets on public property because this is too closely related to the confinement of ideas.¹⁹⁷ Courts can, however, grant contract damages against a publisher who reveals the name of a source contrary to an agreement with the publishing company because, there, the company has contractually agreed to limit its First Amendment rights, essentially altering its status regarding constitutional protection.¹⁹⁸

In each of these cases, where the Supreme Court has upheld the restriction, a status claim trumped any notion that only ideas were at stake, be it the status of a certified city engineer who is presumably familiar with the city's sound equipment, the preservation of the status of equal citizenship by limiting those with political agendas from possibly impairing a citizen's right to vote, or the status of being freely able to enter into a contract regarding one's rights. Where no such status claim existed, the Court prohibited the government from interfering with the freedom of expression of those seeking to make their views known.

With respect to neutral rules of general applicability, the government can

192. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 799 (1989). The Court reasoned that the city's interest, which would be served by the content-neutral justifications, were sufficient to justify the regulations. See *id.* at 79.

193. See *Boos v. Barry*, 485 U.S. 312, 324-25 (1988) (reasoning such regulation designed to prevent intimidation at polling places); see also *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (upholding ordinance prohibiting sign posting for political candidate on public property).

194. See *Martin v. City of Struthers*, 319 U.S. 141, 157 (1943).

195. See *Marsh v. Alabama*, 326 U.S. 501, 516-17 (1946).

196. *Martin v. City of Struthers*, 319 U.S. 141, 147-48 (1943).

197. *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (holding city's interest in maintaining clean streets insufficient to justify restriction).

198. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (finding company limited First Amendment rights pursuant to confidentiality agreement).

utilize time, place, and manner restrictions to regulate speech in a public forum to minimize disruption to the area.¹⁹⁹ Additionally, a regulation passes constitutional muster if it serves an important governmental interest, is unrelated to the suppression of speech, and any incidental restrictions on speech are no more than essential to satisfy the interest.²⁰⁰ All these examples might be thought of as guaranteeing the status of equal citizenship to those seeking to use the parks and byways without First Amendment conflict by ensuring that the limitation on speech is narrowly drawn. A debatable example of a regulation serving an important governmental interest would be a state law requiring, in the name of public morals, female dancers at commercial clubs to wear pasties and persons of either sex to wear g-strings.²⁰¹ It is difficult to understand what status the law is protecting here because a visitor presumably can choose, provided they are given proper notice like “Adult Club,” whether to enter such establishments.²⁰²

Government can also regulate against sleeping in the park as a reasonable time, place, and manner restriction.²⁰³ The state can also enforce similar restrictions at abortion clinics.²⁰⁴ Along the same lines as my discussion of the *Jaycees* case, these cases can also be controversial. If the splash-over effect of the park regulations is to blind the public to a protest illustrating the plight of homeless people, it may very well spill more onto the speech side than the status side of making the parks easily accessible to the public at large. Similarly, if no good reason other than public order or morals exists for requiring female dancers to wear pasties and g-strings in a private membership club, it may be that the night club in question had already accommodated that public need by posting a proper notice.

B. *Compulsions of Speech*

With regard to compulsions of viewpoint, I have discussed already the Court’s failure to consider all the status-related facts in *Boy Scouts of America v. Dale*.²⁰⁵ Additionally, if the state was merely forcing the Boy Scouts to adopt a certain point of view contrary to their beliefs, then, even under my argument, the Court would have been correct to disallow the requirement. But, of course, that is not what happened in that case. In contrast, the state can require applicants to report on a questionnaire for admission to the bar whether

199. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-50 (1981).

200. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

201. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563-64 (1991).

202. *Id.*

203. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984).

204. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 775-76 (1994) (holding narrow limitations on abortion clinic picketing do not “burden” speech).

205. *See supra* Part V.C (examining Court’s treatment of Boy Scouts’s exclusion of gay scoutmaster as inconsistent with organization’s beliefs).

they knowingly affiliated with a group advocating the overthrow of the United States government. The grounds for the regulation are that such affiliation could arguably affect the public's expectation of lawyers' commitment to the rule of law.²⁰⁶ The state, however, cannot require children in public schools to salute the flag, because such a requirement only minimally supports good citizenship while maximally impacting religious and possibly other beliefs.²⁰⁷ Similarly, New Hampshire cannot prevent those who use its highways and byways from blocking from their automobile license plates the phrase "Live Free or Die" because the statement might be seen as forcing advocacy of a political viewpoint on them.²⁰⁸ Additionally, libraries that receive federal funds can be required to install filters to block sexually explicit materials because the state has a right to choose, through its funding decisions, what materials it will expect recipients of its grants to display.²⁰⁹ Alternatively, a state cannot force a public utility company to include with its mailed billings information from a public interest group because that implicates the company's private viewpoints.²¹⁰ In each of these examples, government has a freer hand where the speech is its own, usually because it has funded it, or, in the case of lawyers, because it is trying to ensure that those admitted to the bar subscribe to the rule of law. Otherwise, compulsions of viewpoint are disallowed.

Regarding content-based compulsions, newspapers cannot be required to publish responses of those it attacks.²¹¹ However, the Court has previously upheld, in a unanimous decision, the constitutionality of the "fairness doctrine" applied to the broadcast media that required balanced discussions on public issues.²¹² The difference between the two cases turns on the relative scarcity of radio frequencies which allowed a different result to avoid disenfranchisement of any group, notwithstanding the requirement of strict scrutiny.²¹³ In another federal communications case, where cable operators were required to carry signals of a specified number of local stations, the Court took a different approach.²¹⁴ There, the Court noted that the difference between the cable case and the broadcast media case was that cable companies do not suffer inherent

206. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 164-65 (1971).

207. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-42 (1943).

208. *See Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977).

209. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 203, 204 (2003).

210. *See Pac. Gas & Elect. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1,4, 20-21 (1986).

211. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

212. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369-96 (1969). The Court upheld the fairness doctrine and statute by reasoning that it enhanced, not abridged, the freedoms of speech and press. *Id.* at 375.

213. *See id.* at 388 (limited number of frequencies required by government to regulate who could have public broadcast rights). The *Red Lion* Court did not specifically state that strict scrutiny applied to its facts, and in *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 641-43 (1994), the Court suggested that the appropriate test was less rigorous than intermediate scrutiny.

214. *See Turner Broadcasting Co.*, 512 U.S. at 630-32 (noting carriage requirements depending on size of cable provider).

limitations on available frequencies.²¹⁵ Rather, according to Justice Kennedy's plurality opinion, the difference was that requiring cable companies to carry a specific number of local channels was content-neutral though speech-based, and therefore only required application of intermediate scrutiny.²¹⁶ What ties together these cases is not the issue of status as ideas but rather the issue of status as access to a forum for the expression of ideas. The cases signal that as status becomes more evident in the sense described, either because the opportunities for rebuttal are less present or the issue is more related to hearing the ideas of the outsider, regulations to compel equal opportunity to be heard take priority.

That the Court might have considered this phenomenon is revealed in two earlier speech-based, content-neutral cases. In the first, the Court upheld a statutory right of access to a shopping center for protesters against the owners' claim that the statutory right of access violated their First Amendment rights.²¹⁷ In the second, the Court held that public universities could use a student fee to fund extracurricular speech with which not all students agreed.²¹⁸ That shopping centers are places where the public comes and goes as it pleases puts the first case into the neutral category.²¹⁹ Moreover, not to allow access to the shopping center would deny the public a substantial forum for receiving information, since most people enter and leave such centers in automobiles. As the Court noted, it was unlikely that the public would identify the owners with those who pass out leaflets or seek signatures on petitions just because they are on the owner's property.²²⁰

In *Board of Regents of the University of Wisconsin*, where the university had an interest in promoting diversity, the proper inquiry was whether the university distributed the funds in a viewpoint-neutral manner. Provided the university met that criterion, the state could affect its compelling interest in furthering status equality by supporting student diversity on campus.²²¹ Finally, for the general application of speech-neutral regulations, our prior discussion of *Roberts* is the opportune example.²²²

VII. CONCLUSION

I have suggested a new approach to understanding First Amendment law and

215. *Id.* at 639.

216. *Id.* at 622. It was thought that the public would be better served by having access to local channels which might provide programming or information more closely related to their own lives. *Id.*

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

218. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233-34 (2000).

219. *See PruneYard Shopping Ctr.*, 447 U.S. at 86-87 (suggesting unlikely that policy will link protesters' views with owners' because nature of the shopping center is to be open to the public).

220. *Id.* at 87-88.

221. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (holding under Fourteenth Amendment public university law schools have compelling interest in creating diverse student bodies).

222. *See supra* Part V.A.

its relationship to government regulation in order to ensure equal citizenship. I have suggested that the older approach of beginning from political speech was too limited to explain adequately all the modern applications of the First Amendment, both to specific cases of expressive association, and more generally, to large and popular, often governmentally supported groups, like the Boy Scouts, the media, and our changing social environment. I garnered from the older approach that behind political speech lays a deeper philosophical distinction between mind and body understood in terms of status. I attempted to show that a modern application of the mind/body distinction might entail the kinds of status concerns more generally associated with social structures—some of which will be political—that the Court has recognized as providing legitimate constraints on First Amendment liberty. With that in mind, I ventured to suggest that this further understanding of what lies more deeply buried behind the older political speech view might be just what is needed to understand, in a principled fashion, modern First Amendment law.