



Comments

Right to Exclude or Forced to Include?
Creating a Better Balancing Test for Sexual
Orientation Discrimination Cases

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I. INTRODUCTION

Beginning at a young age, individuals start choosing to exclude others. Toddlers decide who will be their snack-time seatmates. Children choose whom to exclude from their playground dodge ball team. College fraternities and sororities induct only chosen classmates into their organizations. Businesses pick their preferred employees from stacks of applications.

The ability to include or exclude individuals is often taken for granted as an individual's or organization's assumed right. But what happens when an organization refuses to admit a member because she is female? Or because he is Latino? Or because she identifies as a lesbian? Does eradicating discrimination trump one's choice of association?

In *Roberts v. United States Jaycees*,¹ the Supreme Court stated that one's "freedom of association . . . plainly presupposes a freedom not to associate."² However, the Court also recognized that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests. . . . Discrimination based on archaic and overbroad assumptions . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life."³

A modern-day civil rights battle rages between groups asserting their constitutional right of expressive association⁴ and states attempting to eliminate discrimination by enacting non-discrimination statutes. This Comment will argue that the Supreme Court has failed to recognize that eradicating sexual orientation-based discrimination is a compelling state interest. It will also suggest a proposal for balancing an organization's right of freedom of association with a state's interest in eradicating discrimination through non-discrimination statutes.

1. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

2. *Id.* at 623 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)).

3. *Id.* at 623, 625.

4. Expressive association is an individual's right to associate with others while carrying out the First Amendment freedoms of speech, assembly, and religion; its purpose is to "preserv[e] other individual liberties." *Id.* at 618.

First, this Comment will begin by providing background information⁵: it will trace the development of the freedom of expressive association jurisprudence, the proliferation of non-discrimination laws for state-protected classes, and the convergence of these two areas in the Supreme Court's strict scrutiny "balancing test" provided in *Roberts*.⁶

Second, this Comment will analyze whether the Supreme Court's test provides the best possible balance between federal constitutional expressive association rights and the non-discrimination rights of state-protected classes. This Comment will discuss the application of *Roberts* to gender discrimination cases, arguing that those cases "got it right" by: (1) recognizing that a state has a compelling interest in eradicating discrimination, and (2) substantively applying the Supreme Court's strict scrutiny test.⁷ Then, this Comment will scrutinize how the gender discrimination cases "got it wrong" by failing to substantively apply the Court's own compelling state interest standard in instances where organizations discriminated against individuals protected by state non-discrimination laws.⁸ Finally, this Comment will suggest that, when applying the Court's rationale in the gender discrimination cases, the Court should recognize that eradicating sexual orientation discrimination is a compelling state interest.⁹

This Comment will conclude by proposing a "better balance" by altering the Court's current strict scrutiny standard to better serve cases involving sexual orientation discrimination.¹⁰ The proposal of this Comment achieves two goals: (1) it provides a specific definition of compelling state interest; and (2) it creates a demanding, two-prong standard that organizations attempting to discriminate on the basis of sexual orientation must meet in order to exclude individuals.

II. BACKGROUND: GETTING TO THE "BALANCE"

To properly analyze the Supreme Court's current balancing test¹¹ as announced in *Roberts v. United States Jaycees*, one should first

5. See *infra* Part II.A.

6. See *Roberts*, 468 U.S. at 623.

7. See *infra* Part II.B.

8. See *infra* Part II.C.

9. See *infra* Part III. This Comment does not attempt to analyze potential court-related pitfalls and claims of parties alleging sexual orientation discrimination under the Equal Protection Clause. See U.S. CONST., amend XIV. For an analysis of equal protection jurisprudence that includes a discussion of sexual orientation discrimination, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

10. See *infra* Part IV.

11. See *Roberts*, 468 U.S. at 623 ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations

understand why this test was developed. The background of this Comment will show the history behind the *Roberts* balancing test by tracing the development of freedom of expressive association, the development of state non-discrimination laws, and the convergence of these two areas in the Supreme Court's balancing test.¹²

A. *Development of Freedom of Expressive Association*

The freedom of expressive association is rooted in the First Amendment of the Constitution,¹³ which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."¹⁴ The Court then extrapolated on the concept of freedom of religion, speech, and assembly.¹⁵ It recognized that, to carry out these First Amendment freedoms, individuals must have a right of association for the purpose of "preserving other individual liberties."¹⁶

The jurisprudence then splits into two types of expressive association: intimate¹⁷ and organizational.¹⁸ Group expressive association, as recognized by the Court, permits a group or organization to engage in efforts, like speech and assembly, to effectuate their constitutional rights; associational freedom encompasses one's right "to associate with a wide range of political, social, economic, educational, religious, and cultural ends."¹⁹

Several cases supply the rich history of organizational freedom of expressive association. First, in *NAACP v. Alabama*,²⁰ the Court addressed the issue of whether the State Attorney General of Alabama could compel the NAACP to reveal the names and addresses of all of its members.²¹ The Court held that, while the state had not directly curtailed

adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

12. See *infra* Parts II.A.-C.

13. See U.S. CONST., amend. I.

14. *Id.*

15. See *Roberts*, 468 U.S. at 618.

16. *Id.*

17. Intimate association preserves "certain kinds of highly personal relationships" from state interference; examples include freedom to marry and raise one's children. See *id.* Intimate association is not a topic discussed in this Comment.

18. See *id.* at 622.

19. *Id.*

20. *NAACP v. Alabama*, 357 U.S. 449 (1958).

21. *Id.* at 450.

the members' rights to associate within the organization, the state's disclosure requirement created "the likelihood of substantial restraint" on the members' right to associate.²² Because the state created a significant indirect effect on the members' ability to associate within the group, the Court found the state requirement unconstitutional.²³ The oft-quoted portion from *NAACP* is that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."²⁴

A second example of Court-recognized expressive association rights is provided in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*.²⁵ The city of Berkeley imposed an ordinance that limited contributions to committees supporting or opposing ballot measures; however, the ordinance imposed no such limit on individuals supporting or opposing the same measures.²⁶ The ordinance affected only those persons who attempted to effectuate political change while acting in concert. Therefore, the Court found that the state infringed on individuals' freedom to express themselves through group association.²⁷

The third example of Court-recognized freedom of expressive association is found in the watershed case of *Roberts v. United States Jaycees*, which will be discussed at length, *infra* Part III. In *Roberts*, the Jaycees organization challenged the constitutionality of a Minnesota statute that would require the organization to admit women.²⁸ In discussing whether the group had an expressive association claim, the *Roberts* Court clearly stated the foundation for the right of expressive association:

According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . .

Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. . . . [G]overnment may seek to impose penalties or withhold benefits from individuals because of

22. *Id.* at 462.

23. *See id.*

24. *Id.* at 460.

25. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981).

26. *See id.* at 292.

27. *See id.* at 299-300.

28. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 615 (1984).

their membership in a disfavored group . . . it may attempt to require disclosure of the fact of membership . . . and it may try to interfere with the internal organization or affairs of the group. . . . Freedom of association therefore plainly presupposes a freedom not to associate.²⁹

To effectively protect First Amendment rights, the Court recognized an organization's freedom to engage in expressive association.³⁰ This right affords protection from the government's interference into an organization's speech, assembly, and group membership.³¹ However, this associational right was soon called into question by states' non-discrimination statutes.³²

B. Development of State Non-Discrimination Laws: From Race to Gender to Sexual Orientation

A conflict with associational rights emerged when states promulgated civil rights and public accommodation laws. These laws forced organizations to include or admit certain individuals by prohibiting organizations' use of selection criteria based on race, gender, and, in some instances, sexual orientation.³³ This forced-inclusion caused many to question what happened to the Court's principle that "freedom of association therefore plainly presupposes a freedom not to associate."³⁴ This section will analyze the historical development of states' non-discrimination statutes in the context of cases and statutes that will be discussed later in the Comment.

The civil rights movement of the 1950s and 1960s led to the enactment of the Federal Civil Rights Act of 1964.³⁵ This statute prohibits public accommodations and employers from discriminating on the basis of race, color, religion, or national origin.³⁶ States soon followed suit and enacted their own public accommodation statutes. One example of protecting race as a class is the New York statute found in

29. *Id.* at 622-23.

30. *See id.*

31. *Id.*

32. *See infra* Part II.B.

33. *See* N.Y. Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) (New York statute prohibiting race-based discrimination); *see also* Md. v. Burning Tree Club, 554 A.2d 266 (Md. 1989) (Maryland Constitution prohibiting sex-based discrimination); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bi-sexual Group of Boston, 515 U.S. 557 (1995) (Massachusetts statute prohibiting sexual orientation-based discrimination).

34. *Roberts*, 468 U.S. at 623.

35. The public accommodations portion of the Civil Rights Act of 1964 is currently codified at 42 U.S.C. § 2000(a) (2006).

36. *See* 42 U.S.C. § 2000(a) (2006).

New York Club Association, Inc. v. City of New York,³⁷ which prohibits discrimination in places of public accommodation, resort, or amusement on the basis of, *inter alia*, race, color, or national origin.³⁸ Today, forty-five states and the District of Columbia have enacted public accommodation statutes that prohibit discrimination on the basis of race, color, or national origin.³⁹

In addition to protecting race as a class, women also received class protection under various state laws.⁴⁰ *Maryland v. Burning Tree Club*⁴¹ discusses Maryland's constitutional provision mandating that equality of rights under the law not be abridged or denied because of sex.⁴² Many states have adopted similar provisions that prohibit discrimination on the basis of sex, either in their constitutions or in their equal protection statutes.⁴³ The federal government, through Title VII of the Civil Rights Act of 1964, also recognizes gender as a protected class, especially in the area of discrimination in employment.⁴⁴

More recently, some states have recognized sexual orientation as a protected class by prohibiting discrimination in places of public accommodation on the basis of one's sexual orientation. Examples of these statutes are found in both *Hurley v. Irish-American Gay, Lesbian Bi-sexual Group of Boston*⁴⁵ and *Boy Scouts of America v. Dale*.⁴⁶ Massachusetts's statute, discussed in *Hurley*, applies to public accommodations and prohibits "distinction, discrimination, or restriction on account of . . . sexual orientation."⁴⁷ New Jersey's statute, discussed in *Dale*, prohibits, *inter alia*, discrimination on the basis of one's sexual orientation in broadly defined places of public accommodation.⁴⁸ Currently, eighteen states and the District of Columbia prohibit

37. *N.Y. Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988).

38. *Id.* (citing N.Y.C. LOCAL LAW No. 63, § 1, App. 14-15 (1985)).

39. The states that have not enacted these statutes are Alabama, Georgia, Mississippi, North Carolina, and Texas. See Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL'Y & L. 331, 340 (2006).

40. See *infra* note 43.

41. *Md. v. Burning Tree Club*, 554 A.2d 366 (Md. 1989).

42. See MD. CONST., art. XLVI.

43. Representative laws are found in the following states: Pennsylvania, see PA. CONST. § 28; Maryland, see Md. CONST., art. XLVI; and California, see CAL. CONST., art. 1 §§ 8, 31(a).

44. See 42 U.S.C. § 2000e-2 (2000).

45. *Hurley v. Irish-Am. Gay, Lesbian & Bi-sexual Group of Boston*, 515 U.S. 557 (1995).

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

47. MASS. GEN. LAWS. 272 § 98 (2008).

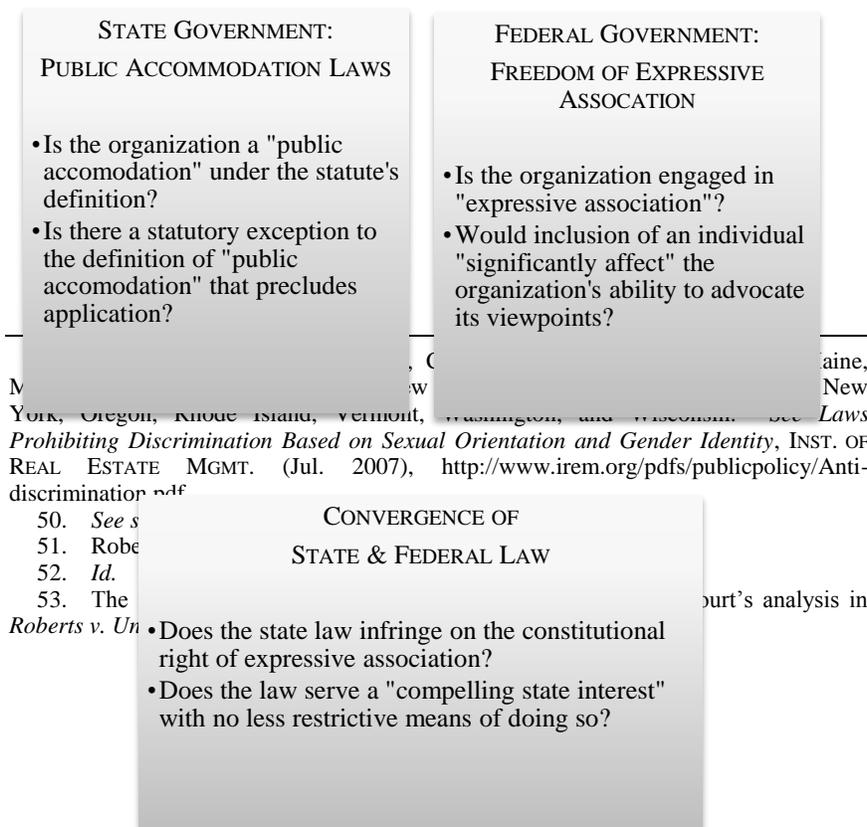
48. N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (West 2002).

discrimination on the basis of sexual orientation in places of public accommodation.⁴⁹

States' laws and constitutions regarding discrimination, either in the context of public accommodations or employment, have evolved with the cultural climate of the time. From the women's liberation movement to the civil rights era to the cultural acceptance of individuals identifying as gay, lesbian, or bi-sexual, states have recognized the importance of eradicating discrimination against certain classes of individuals.⁵⁰ However, the states' mandate against discrimination was not supreme forever; the Supreme Court developed a balancing test to weigh a state's interest in eradicating discrimination against one's right of expressive association.⁵¹

C. *The Two Converge: The Supreme Court's "Balancing" Test*

The Court's balancing current test is one of strict scrutiny: does the state's law mandating non-discrimination serve a compelling state interest with no less restrictive means of serving that purpose?⁵² However, as illustrated below, that specific inquiry is only considered after the Court has satisfied two other separate lines of inquiry: one line inquires into the state's public accommodation laws and the other line of inquiry delves into the constitutional freedom of expressive association.⁵³



50. See s

51. Robe

52. *Id.*

53. The
Roberts v. Un

ourt's analysis in

In application, the inquiries of “compelling state interest” and “significant effect” are combined into a two-prong balancing test. To successfully argue that an organization or public accommodation must include certain individuals, one must prove that the compelling state interests override any significant effect that the inclusion of certain individuals may have on the organization’s ability to advocate its viewpoint.⁵⁴ This section outlined the Supreme Court’s current test for state laws infringing on constitutional associational freedoms; the next section will demonstrate the Court’s application of the strict scrutiny analysis in two contexts: gender and sexual orientation.

III. ANALYSIS: A TRUE BALANCE?

A. *The Gender Discrimination Cases: What the Courts Got Right*

In a line of cases decided in the 1980s, courts recognized a compelling state interest in eradicating discrimination perpetrated by organizations against women and successfully applied the previously discussed *Roberts* test.⁵⁵ First, the courts analyzed what state interests existed in eradicating gender discrimination.⁵⁶ Then, the court

54. *See Roberts*, 468 U.S. at 620, 626-27 (stating that the compelling state interest of eradicating gender discrimination overrides any effect on the Jaycees’ ability “to disseminate its preferred views”).

55. *See supra* Part II.C.

56. *See Roberts*, 468 U.S. at 624-25 (enumerating state interests in eradicating gender discrimination).

determined whether those interests rose to the level of “compelling.”⁵⁷ Finally, the courts tried to ascertain the potential effects that inclusion would have upon the organization.⁵⁸

The gender discrimination cases cited several interests that the various courts considered to be “compelling”: assuring equal access to goods and services; removing economic, political, and social barriers that historically plagued disadvantaged groups; encouraging wide participation in political, economic, and cultural life; and advancing the individual dignity of all persons.⁵⁹ Additionally, the Court recognized that including women would not significantly affect the ability of any of the organizations at issue to advocate for or present their viewpoints to the public.⁶⁰

The landmark inclusion case, *Roberts*, applied Minnesota’s non-discrimination law⁶¹ to the United States Jaycees organization, which refused to admit women into one class of its organizational membership.⁶² The *Roberts* Court found that Minnesota had compelling interests in eradicating gender discrimination.⁶³ The Court cited to the “changing nature”⁶⁴ of the American economy and the importance of

57. *See id.* at 626 (stating factors that make a state interest “compelling”).

58. *See id.* at 627 (determining effect on organization when state forces inclusion of individuals).

59. *Id.* at 624-26. One may argue that the Court found these interests to be compelling because gender is a suspect class and the Court may not find the same compelling interests when sexual orientation is involved, because sexual orientation is not a suspect class. *See Romer v. Evans*, 517 U.S. 620 (1996). However, this Comment contends that the same compelling interests that the *Roberts* court found in eradicating gender discrimination also exist in the context of sexual orientation discrimination, regardless of the Court’s classification of the class of persons being discriminated against. *See infra* Part III.C.

60. *See Roberts*, 468 U.S. at 627; *see also* Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).

61. The Minnesota statute analyzed reads, “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.’” *Roberts*, 468 U.S. at 615 (citing MINN. STAT. § 363.03, subd. 3 (1982)). The Court determined that the Jaycees organization was a public accommodation under the statutory definition (a “public business facility”) and to which the public accommodation statute applies because: (1) it is a business, exchanging goods and privileges for monetary dues; (2) it is public, soliciting its business based on “an unselective criteria”; and (3) it is a facility, conducting its activities at various fixed or mobile sites throughout the State. *Roberts*, 468 U.S. at 616.

62. *See Roberts*, 468 U.S. at 609 (“Regular membership is limited to young men between the ages of 18 and 35, while associate membership is available to persons ineligible for regular membership, principally women and older men.”).

63. *See id.* at 626.

64. *Id.*

removing barriers that have hindered the advancement of women, a historically disadvantaged group, in social, political, and economic spheres.⁶⁵ The Court stated that any impact on the associational rights of the Jaycees' male members was minimal when compared to those previously-mentioned compelling state interests of eradicating gender discrimination and ensuring gender equality.⁶⁶

Another organization, Rotary International, also struggled with gender discrimination in the 1980s.⁶⁷ One specific club, The Rotary Club of Duarte, admitted women as members.⁶⁸ Because of this admission, Rotary International threatened to remove the Duarte Rotary's recognition as a Rotary Club.⁶⁹ The Duarte Rotary alleged that this removal would violate California's Unruh Civil Rights Act.⁷⁰ In analyzing Duarte's suit against the international organization, the Court found that forcing inclusion of women into the Rotary might infringe on the organization's unbridled associational freedom.⁷¹ However, associational freedoms may be limited by state action satisfying the Court's strict scrutiny test.⁷² Here, the Court found, for reasons similar to the *Roberts* Court, that eliminating gender discrimination was a compelling state interest.⁷³ The Court also determined that forcing the Rotary to include women would not significantly affect the organization's ability to advocate its stated viewpoint, which was to facilitate fellowship and promote service through a membership body that constitutes a wide cross-section of businesses.⁷⁴

Maryland v. Burning Tree Club, Inc.,⁷⁵ provided another analysis of gender discrimination. While this case is not a forced-inclusion case, the Maryland Court of Appeals analyzed the facts through the lens of

65. *Id.*

66. *Id.* at 623.

67. The Rotary International Constitution stated that membership in its clubs was available to men only. *See Rotary Club of Duarte*, 481 U.S. at 541.

68. *See id.*

69. *See id.* at 541-42.

70. The Civil Rights Act states, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.* at 542 n.2 (quoting CAL. CIV. CODE ANN. § 51 (West 1982)).

71. *Id.* at 549.

72. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

73. *Rotary Club of Duarte*, 481 U.S. at 549.

74. While the organization argued that "the exclusion of women results in an 'aspect of fellowship . . . that is enjoyed by the present male membership,'" the Court found that the fellowship enjoyed by male membership was slight when compared to the state's compelling interest in eliminating gender discrimination. *Id.* at 541, 549.

75. *Md. v. Burning Tree Club, Inc.*, 554 A.2d 366 (Md. 1989).

Roberts. Here, the Burning Tree Club (the Club) refused to admit women into its country club, which violated the Maryland's equal rights amendment to its Constitution.⁷⁶ The Club, however, questioned the validity of a state statute that denied tax benefits to country clubs that engaged in gender discrimination, arguing that this statute impermissibly infringed on its associational freedom.⁷⁷ The court held that the statute did not impermissibly infringe on the Club's associational freedom.⁷⁸ Because the statute did not force the Club to admit women, but denied the Club a benefit because of its discriminatory practices, the court applied an intermediate scrutiny test, finding a "compelling interest justifying the imposition of [the preferential tax assessment] burden."⁷⁹ Specifically, the court recognized that Maryland's enactment of its equal rights amendment "made a commitment to equal rights for women which elevates the goal of eliminating state-supported sex discrimination to a compelling state interest."⁸⁰

In this line of cases, the courts "got it right" in two specific ways. First, the courts correctly looked to the substance of the states' interests to analyze whether those interests were compelling, rather than merely concluding that interests were or were not compelling.⁸¹ Ultimately, the courts found compelling interests in the following substantive areas when addressing gender discrimination cases: assuring equal access to goods and services, removing barriers that have historically plagued disadvantaged groups, encouraging wide participation in political, economic, and cultural life, and advancing the individual dignity of all persons.⁸² Second, the courts "got it right" by focusing their analyses of compelling state interests on the state's own constitution or statute.⁸³ Placing emphasis on state-enacted statutes provides the courts with insight into what, specifically, the state considers a compelling interest.

76. The Constitutional provision mandates that the equality of rights under the law not be abridged or denied because of sex. MD. CONST., art. XLVI.

77. *Burning Tree Club*, 554 A.2d at 377.

78. *Id.* at 377-78.

79. *See id.* at 384.

80. *Id.*

81. *See supra* Part III.A. for a discussion of the courts' analyses of gender discrimination in Maryland. *v. Burning Tree Club, Inc.*, 554 A.2d 366 (Md. 1989), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The cases in which the United States Supreme Court did not substantively analyze states' interests are discussed *infra* Part III.B.

82. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-26 (1984).

83. *See Burning Tree Club*, 554 A.2d at 384 (stating that Maryland's enacting a Constitutional provision that elevated the goal of eradicating discrimination created a compelling state interest).

This focus on state law is important because the court is supposed to be analyzing the state's interests, not the interests of the federal government.⁸⁴ Unfortunately, courts did not use this same rationale and apply this same emphasis when determining the outcome of the sexual orientation discrimination cases.⁸⁵

B. The Sexual Orientation Discrimination Cases: What the Court Got Wrong

The United States Supreme Court has refused to find that eradicating sexual orientation discrimination is a compelling state interest.⁸⁶ In fact, the Court has either failed to apply or conducted a cursory analysis of its own strict scrutiny test to cases where organizations exclude individuals based on sexual orientation.⁸⁷ This section analyzes two cases to demonstrate that the Court "got it wrong" in its analysis of these sexual orientation discrimination cases.

In *Hurley*, the Court failed to apply its strict scrutiny test at all, upholding parade organizers' exclusion of an Irish-American gay, lesbian, and bi-sexual group ("GLBI") that wished to march in the parade.⁸⁸ Following the test set up in *Roberts*, the Court should have inquired into four areas. First, in analyzing the state statute, the Court needed to determine: (a) whether the parade organizers were prohibited from discriminating by a state public accommodation statute, and (b) whether that statute applied in this situation.⁸⁹ Second, in analyzing the constitutional right, the Court needed to determine: (a) whether the excluding organization was engaged in expressive association, and (b) whether the inclusion of the GLBI would significantly affect the

84. See *Roberts*, 468 U.S. at 623 (holding that compelling *state* interests are what may justify a state's infringement on the right of expressive association) (emphasis added).

85. See *infra* Part III.B.

86. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (stating that no state interests in New Jersey's public accommodation law justified re-admitting gay scoutmaster Dale to the Boy Scouts organization).

87. See *Hurley v. Irish-Am. Gay, Lesbian & Bi-Sexual Group of Boston*, 515 U.S. 557 (1995) (applying free speech analysis but failing to apply strict scrutiny test); see also *Dale*, 530 U.S. 640 (finding no "compelling state interest" without full discussion of potential state interests). Without mere conjecture, one cannot state that the Court's failure to apply the balancing test or its cursory application of the balancing test is an intentional avoidance of the "hot-button" topic of sexual orientation discrimination.

88. See *Hurley*, 515 U.S. at 572-73.

89. See *Roberts*, 468 U.S. at 615-17 (determining whether a public accommodation statute existed and was applicable).

parade organizers from advocating their viewpoints.⁹⁰ Third, if the first two lines of inquiry were satisfied, then the Court must determine whether the state law requiring inclusion infringed on the organization's constitutional associational rights.⁹¹ Finally, the Court must apply the strict scrutiny test: does the state's law prohibiting discrimination, and thereby mandating inclusion, serve a compelling state interest with no less restrictive means of serving that interest?⁹²

In analyzing the parade organizers' First Amendment rights, the Court found that the organization was engaging in expressive conduct and, as such, was entitled to First Amendment protection.⁹³ However, when the Court turned to the application of Massachusetts's public accommodation statute⁹⁴ to the parade, it held that the state court improperly applied the statute to the parade.⁹⁵ The Court did not view the parade as a place of public accommodation.⁹⁶ Instead, it determined that the "speech" of the parade itself was not a public accommodation.⁹⁷

90. *See id.* at 623-27 (applying a public accommodation statute to the freedom of organizational association and determining affect of inclusion of certain members).

91. *See id.* at 628 (stating affect of public accommodation statute on constitutional associational rights).

92. *See id.* at 626 (stating the strict scrutiny test as the Court applied it to the Jaycees organization).

93. *Hurley*, 515 U.S. at 567.

94. The statute prohibits discrimination on the basis of, *inter alia*, sexual orientation "in the admission of any person to, or treatment in any place of public accommodation, resort or amusement." *Id.* at 572 (quoting MASS. GEN. LAWS § 272:98 (1992)).

95. *See id.* at 572-73.

96. *See id.*

97. In its opinion, the Court clarified this imaginative logic as follows:

In the case before us . . . the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. . . . Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation . . . , once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsor's speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the

As such, the Court held that the public accommodation statute did not apply; the parade organizers were entitled to express their chosen message without any infringement by GLBI.⁹⁸

The Court did not address whether the parade itself was a public accommodation to which the statute applied, which was the position of the state court.⁹⁹ Unfortunately, the Court's implied adoption of the state court's position allowed the Court to avoid applying the strict scrutiny test at all. In this case, there is no discussion of what effect GLBI would have on the parade organizers' message or whether Massachusetts had compelling interests in eradicating sexual orientation discrimination that trump the potential effect of inclusion of the GLBI. In framing the issue as it did,¹⁰⁰ the Court ignored its balancing test.

While *Hurley* demonstrates the Court's avoidance of the balancing test,¹⁰¹ *Boy Scouts of America v. Dale* exemplifies the Court's unwillingness to substantively apply its balancing test. Here, the Boy Scouts removed a scoutmaster from his post after he publicly espoused a gay sexual orientation; the Court did not require that the Boy Scouts re-admit him.¹⁰²

First, in analyzing the state statute, the Court found New Jersey's public accommodation law applicable to the Boy Scouts organization; second, in analyzing the constitutional associational rights, the Court determined that the Boy Scouts engaged in expressive association.¹⁰³ Third, the Court determined that the organization's espoused viewpoint, based on testimony at trial, was that "the organization does not want to promote homosexual conduct as a legitimate form of behavior."¹⁰⁴ The Boy Scouts argued that homosexual conduct was "inconsistent with the values" of the Boy Scouts as embodied in its Oath and Law.¹⁰⁵ Therefore, in analyzing the significant effect of including Dale in the

First Amendment, that a speaker has the autonomy to choose the content of his own message.

Id. (citations omitted).

98. *See id.* (stating that the "peculiar" application of the statute to the parade was incorrect). The state court viewed the parade as a public accommodation, a fact that the Supreme Court seemed not to dispute; however, the Court did not address the parade and, instead, focused on its argument that the public accommodation statute was inapplicable to the speech in the parade. *See id.*

99. *See id.*

100. *See supra* note 97.

101. *See supra* Part III.B.

102. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000).

103. *Id.* at 640-41.

104. *Id.* at 641.

105. The Oath and Law espouses the values of being "morally straight" and "clean."
Id.

Boy Scouts organization, the Court stated that Dale's position as an Assistant Scoutmaster would harm the Boy Scouts' ability to express its viewpoint—that a homosexual lifestyle is not a legitimate lifestyle choice.¹⁰⁶

The next step of analysis, according to *Roberts*, is to apply the strict scrutiny test—whether the statute restricting associational freedoms serves a compelling state interest that can be achieved by no less restrictive means.¹⁰⁷ Instead of performing this analysis, the *Dale* Court stumbled. The Court did not undertake a substantive review of the state's interests in eradicating sexual orientation discrimination and did not determine whether those enumerated interests rose to the level of “compelling,” as it did in the gender discrimination cases. Rather, the Court concluded, without further discussion of the state interests involved, that “[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.”¹⁰⁸ The Court merely paid lip service to its own test. It focused on significant effect, only one part of the applicable balancing test, and failed to substantively analyze what interests New Jersey has in eradicating sexual orientation discrimination, the second part of the balancing test.¹⁰⁹

Thus, in the sexual orientation discrimination cases, the Court “got it wrong.” First, it failed to apply its strict scrutiny test, sidestepping the issue entirely.¹¹⁰ Second, it failed to substantively apply the test, merely reciting “no compelling state interest” without engaging in a meaningful discussion of state interests and the factors that make those interests compelling.¹¹¹

C. *Connecting Gender and Sexual Orientation Discrimination: Why Both Are Compelling State Interests*

Had the Court undertaken a substantive analysis of compelling state interests in the sexual orientation discrimination cases, it might have recognized a compelling state interest in eradicating sexual orientation discrimination. The Court-recognized rationale behind eradicating gender discrimination can be analogous to eradicating sexual orientation

106. *Id.*

107. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

108. *Dale*, 530 U.S. at 659.

109. *See id.* (stating that “[t]he state interests . . . do not justify such a severe intrusion on the Boy Scout's rights to freedom of expressive association” without further discussion of the state interests at issue).

110. *See supra* Part III.B.

111. *See supra* Part III.B.

discrimination. In fact, various social statistical studies demonstrate that the same concerns that permit states' prohibition of gender discrimination exist in sexual orientation discrimination.¹¹²

As mentioned previously, the Court stated several compelling interests that states have in eradicating gender discrimination. These interests include: (1) assuring equal access to goods and services; (2) removing economic, political, and social barriers that historically plagued disadvantaged groups; (3) encouraging wide participation in political, economic, and cultural life; and (4) advancing the individuals' dignity.¹¹³

Several of these enumerated interests have particular implications in the realm of sexual orientation discrimination.¹¹⁴ Demonstrated acts of discrimination against individuals based on their sexual orientation have created economic barriers for this group, have discouraged their wide participation in economic and cultural life, and have denigrated these individuals' dignity.¹¹⁵ Examples of these effects of discrimination are discussed in the context of the following two social scientific studies.

Sexual orientation discrimination has created significant wage effects for sexual minorities.¹¹⁶ A study published by Cornell University found that gay and bisexual male workers earned a statistically significant 11 to 27 percent less than heterosexual male workers, even though the workers in the two groups had the same experience, education, occupation, marital status, and geographic residence.¹¹⁷ The same study found a wage difference, though not consistently statistically significant, of between 12 and 30 percent between lesbian or bisexual women and heterosexual women.¹¹⁸ This study shows that sexual minorities encounter significant economic barriers to full participation in the country's economic life, and the Court has recognized that

112. See M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 4 (Jul. 1995) (describing the economic effects of sexual orientation discrimination on those who identify themselves as sexual minorities); see also Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates From a National Probability Sample*, J. INTERPERSONAL VIOLENCE (Apr. 7, 2008), <http://jiv.sagepub.com/content/early/2008/04/07/0886260508316477> (describing the social effects of crimes against sexual minorities).

113. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-26 (1984).

114. See *infra* Part III.C.

115. See Badgett, *supra* note 112 (describing the economic effects of sexual orientation discrimination on those who identify themselves as sexual minorities); see also Herek, *supra* note 112 (describing the social effects of crimes against sexual minorities).

116. See Badgett, *supra* note 112, at 737.

117. *Id.*

118. *Id.*

eradicating economic barriers that hinder full participation in the country's economic life is a compelling state interest.¹¹⁹

A second study¹²⁰ demonstrates the social barriers and denigration of individual dignity that exist in the wake of sexual orientation discrimination. The Herek study analyzed the prevalence of hate crimes and manifested sexual stigma¹²¹ against sexual orientation minorities, and the effects of those crimes and manifested stigma against those who identify themselves as sexual minorities. The data in this study indicated that, since the age of eighteen, approximately 20 percent of the sexual minority population in the United States has experienced a crime against person or property based on their sexual orientation.¹²² When attempted crimes were added to instances of perpetrated crimes, the percentage increased to 25 percent.¹²³ Additionally, about half of the sexual minority population reported victimization by the sexual stigma of verbal abuse or harassment during their adult life, and more than 10 percent experienced housing or employment discrimination.¹²⁴

The existence of wage discrimination and the prevalence of hate crimes and manifested stigmas against gay, lesbian, or bi-sexual individuals demonstrates the economic and social barriers that exist for sexual minorities.¹²⁵ Eradicating discrimination against sexual minorities through non-discrimination statutes, therefore, will advance the Court-recognized compelling state interests of removing social barriers, encouraging wide participation in economic and cultural life, and advancing individuals' dignity.¹²⁶

The Court has recognized compelling state interests in eradicating gender discrimination.¹²⁷ As previously suggested, the same compelling state interests support the need for eradicating sexual orientation discrimination.¹²⁸ Therefore, the Court should recognize that eradicating sexual orientation discrimination is a compelling state interest.

119. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984).

120. Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates From a National Probability Sample*, J. INTERPERSONAL VIOLENCE (Apr. 7, 2008), <http://jiv.sagepub.com/content/early/2008/04/07/0886260508316477>.

121. The study defines sexual stigma as "society's negative regard for any non-heterosexual behavior, identity, relationship, or community." *Id.* at 3.

122. *Id.* at 15.

123. *Id.*

124. *Id.* at 15-16.

125. *See supra* Part III.C.

126. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-26 (1984).

127. *See id.* at 625-26.

128. *See supra* Part III.C.

IV. PROPOSAL: A BETTER BALANCE

As discussed above, states likely have a compelling interest in eradicating sexual orientation discrimination.¹²⁹ Therefore, it is imperative to achieve a better balance between the groups' rights to engage in expressive association and sexual minorities' rights to not be subject to discrimination. This Comment proposes that the aforementioned balance can be achieved by implementing the following two standards. First, the Supreme Court should better define and substantively apply the concept of "compelling state interest." Second, the Court should impose a demanding, yet achievable, standard upon organizations that exclude certain individuals through the exercise of their First Amendment rights, which should satisfy two prongs: (1) the organization must provide clear and convincing pre-trial evidence of the organization's viewpoint, and (2) the trial court must undertake a fact-specific inquiry into how the excluded person will interfere with the organization's previously-established viewpoint.

A. *Compelling State Interest: New Definition, True Application*

Initially, the courts must apply a uniform definition of compelling state interest. In one gender discrimination case, a state court recognized that the placement of a non-discrimination provision in the state's constitution created a compelling state interest.¹³⁰ Federal courts should follow suit. The courts should accept the rule that, if a state expressly includes non-discrimination of a particular class in its statutes or constitution, that state recognizes a compelling state interest in eradicating discrimination against that class of persons. If the state recognizes the existence of that compelling state interest in its statutes or constitution, the federal court should also recognize the existence of that compelling state interest. After all, the standard that a court is to apply, per *Roberts*, is "compelling *state* interest,"¹³¹ not "compelling *national* interest."¹³² The courts should recognize compelling state interests where the state expressly recognizes compelling interests.

129. See *supra* Part III.C.

130. See *Md. v. Burning Tree Club, Inc.*, 554 A.2d 366, 384 (Md. 1989) (stating that Maryland's enacting a constitutional provision that elevated the goal of eradicating discrimination created a compelling state interest).

131. See *Roberts*, 468 U.S. at 623 (holding that compelling *state* interests are what may justify a state's infringement on the right of expressive association) (emphasis added).

132. A search of articles discussing whether courts address sexual orientation discrimination in the context of compelling national interest revealed only a cursory sentence attributed to a National Public Radio broadcast, stating that, in an interview with

However, any definitional changes will be moot if the courts apply a mere cursory analysis to the compelling state interest standard. This Comment has discussed the Court's non-application and superficial application of the compelling state interest standard to sexual orientation discrimination cases.¹³³ Ultimately, for any definitional changes to be effective, the judiciary must be committed to substantive application of the compelling interest standard in subsequent sexual orientation discrimination cases.

B. Significant Effect: Clarifying & Strengthening The Standard

Currently, the Supreme Court applies a significant effect standard: it requires an organization exercising its freedom of expressive association to show how including the excluded individual will significantly affect the organization's viewpoint.¹³⁴ However, both evidentiary problems in *Dale* and the Supreme Court's most recent controversial application of *Roberts* to sexual orientation discrimination demonstrate the need for a clearer, more demanding evidentiary standard. In order to clarify and strengthen the Court's existing standard for application to sexual orientation discrimination cases, the courts should implement the following two prongs.

1. Clear & Convincing Evidence

First, the organization should be required to establish through clear and convincing evidence that, prior to trial, the organization had established viewpoints on the negative effects of one's sexual orientation on the organization. The court should take into consideration several factors to determine if clear and convincing evidence of pre-trial and pre-litigation viewpoints exist, including the organization's charter document, mission statement, board meeting minutes, or like evidence.

Evidentiary problems in *Dale* confirm the need for clear and convincing pre-trial evidence of an organization's viewpoint. In *Dale*, the court relied heavily on organizational statements that were either promulgated in anticipation of litigation or were evidentiary materials

Richard Green, he "opined that in light of a genetic basis for homosexuality, laws discriminating against gays could be upheld only if they fulfilled a compelling national interest." Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE WES. RES. L. REV. 83, 161 n.249 (1994). The focus of courts appears to be on the compelling state interest standard enumerated in *Roberts*, 468 U.S. at 623.

133. See *supra*, Part III.B.

134. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (stating that the Court must determine if an individual's presence "significantly burdens" an espoused organizational viewpoint).

from prior litigation.¹³⁵ The problem with a court's reliance on official, organizational statements prompted solely by litigation is the self-serving nature of such statements. An organization can make statements in anticipation of litigation, in briefs, or at trial that simply serve the interests of its claims of "negative effect of organizational message." Therefore, by relying on clear and convincing pre-trial evidence not made in anticipation of litigation, the court can truly evince the organization's established viewpoints.

2. A Fact-Specific Inquiry

Second, the trial court must make a fact-specific inquiry into how forced inclusion of an individual with a certain sexual orientation might have a significant adverse effect on the organization's ability to advocate for its viewpoint. The court should consider certain factors when analyzing a gay, lesbian, or bi-sexual individual's "significant effect" on an organization, including the following: (1) the excluded individual's proposed position in the organization, (2) the public or private nature of the person's position, and (3) the relationship between the individual's proposed position and the viewpoints of the organization.

Again, certain evidentiary problems in *Dale* demonstrate the need for a more fact-specific inquiry into a person's significant effect on an organization's viewpoint.¹³⁶ The majority in *Dale* stated that, because Dale identified as a gay male, his mere presence as an Assistant Scoutmaster would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."¹³⁷

However, in his dissenting opinion in *Dale*, Justice Stevens disagreed with the majority's rationale, seemingly recognizing the importance of the Court's application of a fact-specific inquiry to determine significant effect. He focused on the nexus between a member's position, that individual's personal beliefs, and the organization's espoused viewpoints; ultimately, he noted a very limited, perhaps even non-existent, connection between these three areas of inquiry:

135. These relied-upon statements include the following: assertions made in the Boy Scouts of America's briefs for the *Dale* case; a statement regarding homosexuality admitted in evidence at a trial in the 1980's; and a position statement formulated in 1991, after Dale's membership was revoked. *See id.* at 651-52.

136. *See infra* Part IV.B.2.

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

It is not likely that [Boy Scouts of America (BSA)] would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. . . . The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. . . . It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster.¹³⁸

Implementing the fact-specific inquiry above¹³⁹ will place a greater burden on organizations attempting to exclude gay, lesbian, or bi-sexual individuals. This increased burden is justified because, if courts can merely conclude that a "significant effect" exists, without actually undertaking a substantive review of the facts of the case, discrimination may run rampant, unchecked by actual facts or evidence of true effect.

C. *Cost-Benefit Analysis*

In analyzing this Comment's proposal, it is important to analyze potential benefits and costs that might flow from refining the definition of compelling state interest and strengthening the "significant effect" standard.¹⁴⁰ The potential cost associated with these changes is increased litigation,¹⁴¹ while the potential benefits include promoting the eradication of discrimination against sexual orientation minorities and promoting judicial efficiency.¹⁴² The potential to both increase litigation and promote judicial efficiency may seem at odds with each other; however, the following two sections explain how the two elements may co-exist under this Comment's proposal.¹⁴³

1. Potential Cost: Increased Litigation

This Comment's proposal suggests that, when faced with a case involving a group's exclusion of an individual based on his or her sexual orientation, the court should engage in two lines of inquiry. First, the court should attempt to uncover clear and convincing evidence, in existence prior to litigation, that the individual's sexual orientation will have a significant adverse effect on the organization's viewpoint.

138. *Id.* at 697 (Stevens, J., dissenting).

139. *See supra* Part IV.B.2.

140. *See supra* Part IV.B.

141. *See infra* Part IV.B.2.

142. *See infra* Part IV.C.1.

143. *See infra* Part IV.C.1.

Second, the court should conduct a fact-specific inquiry into how forced inclusion of an individual with a minority sexual orientation might have a significant adverse effect on the organization's ability to advocate for its viewpoint.¹⁴⁴

A litigious standard may arise when this fact-specific inquiry and search for clear and convincing evidence are placed in the court's hands. Under this standard, the court alone will determine whether the factors that create significant effect exist and whether a defendant has provided clear and convincing pre-trial evidence of its viewpoint on how sexual orientation affects its organizational message. Therefore, the potential for increased litigation exists under this proposed standard.

2. Potential Benefits: Judicial Efficiency and Equality

However, two significant benefits are likely to arise under this proposal: the promotion of judicial efficiency and the eradication of discrimination.

First, while litigation may initially arise under this standard, the standard may give way to judicial efficiency in states that choose to protect sexual orientation as a class through their statutes or constitutions. If organizations expect that the court will recognize a compelling interest in a state's statutorily- or constitutionally-protected sexual orientation class,¹⁴⁵ then those organizations may have a weaker claim of protection under expressive association and may be less likely to bring that claim. Organizations will also know the factors the court will apply in forced inclusion cases and the burden that such organizations must meet to overcome the court-recognized compelling state interest.¹⁴⁶ Armed with this knowledge, organizations will be less likely to continue litigation, rendering the judicial process more efficient.

Second, this Comment's proposed changes to expressive association jurisprudence likely will achieve the eradication of discrimination against gay, lesbian, and bi-sexual individuals. Under the proposed standard, an organization will be required not only to prove the existence of its established belief that an individual's sexual orientation will significantly affect its viewpoint, but also to prove to the court that the inclusion of the excluded individual will, indeed, affect its ability to advocate for its viewpoint.¹⁴⁷ By requiring organizations that discriminate to satisfy this fact-intensive inquiry, the standard may discourage discrimination by

144. *See supra* Part IV.B.

145. *See supra* Part IV.A.

146. *See supra* Part IV.B.

147. *See supra* Part IV.B.

organizations that merely dislike or disapprove of individuals of a certain sexual orientation when those individuals may have no effect on the organization's ability to advocate its viewpoint.

V. CONCLUSION

The *Roberts* balancing test, the Court's attempt to give credence to both states' compelling interests in eradicating discrimination and an individual or organization's freedom of expressive association, falls short when it is applied to sexual orientation discrimination cases.¹⁴⁸ The Supreme Court recognizes a compelling state interest in eradicating gender discrimination,¹⁴⁹ stating that this discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."¹⁵⁰ Because the same compelling state interests that support gender equality also support sexual orientation equality,¹⁵¹ the Court "got it wrong" in failing to recognize that eradicating sexual orientation discrimination is a compelling state interest.

Ultimately, if one accepts this Comment's suggestion that states that choose to enact sexual orientation discrimination statutes have a compelling interest in eradicating sexual orientation discrimination, then a better balance must be struck between the constitutional right of groups to engage in expressive association and a state-recognized right of individuals not to be discriminated against by organizations based on one's sexual orientation. This balance can be achieved through imposing a demanding yet achievable standard on organizations that exclude gay, lesbian, and bi-sexual individuals. An organization may overcome the compelling state interest in eradicating sexual orientation discrimination by: (1) providing clear and convincing evidence, in existence prior to litigation, of the organization's belief that the individual's sexual orientation will have a significant effect on the organization's viewpoint, and (2) proving to the court that a gay, lesbian, or bi-sexual individual will actually have a significant effect on the organization's ability to advocate its viewpoint.¹⁵² In determining the significant effect of an excluded individual upon the organization's viewpoint, the court should analyze the individual's proposed position in the organization, the public

148. See *supra* Part III.C.

149. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (ensuring women's equal access to organization's membership and removing sex-based discrimination is a compelling state interest).

150. *Id.* at 625.

151. See *supra* Part III.C.

152. See *supra* Parts IV.B.1.-2.

or private nature of the person's position, and the relationship between the individual's proposed position and the viewpoints of the organization.¹⁵³

While this fact- and factor-specific standard may initially increase litigation, the emergence of a clear definition of "compelling state interest" and a clear standard for "significant effect" through litigation may decrease the number of expressive association violation claims.¹⁵⁴ Additionally, this Comment's proposal will likely achieve the important goal of eradicating discrimination against gay, lesbian, and bi-sexual individuals by emphasizing the Court-recognized ideal of promoting individuals' economic advancement, dignity, and social and cultural participation.¹⁵⁵

153. *See supra* Part IV.B.2.

154. *See supra* Part IV.C.2.

155. *Roberts*, 468 U.S. at 624-26.