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# The Supreme Court Endorses "Invidious Discrimination": *Boy Scouts of America v. Dale* Creates a Constitutional Right to Exclude Gay Men

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# THE SUPREME COURT ENDORSES "INVIDIOUS DISCRIMINATION": *BOY SCOUTS OF AMERICA V. DALE*[*] CREATES A CONSTITUTIONAL RIGHT TO EXCLUDE GAY MEN

*Christopher C. Fowler*[**]

*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.*[1]

## INTRODUCTION

The Boy Scouts of America ("BSA" or "Scouts") is one of the United States' oldest and most revered organizations.[2] It was

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[*] 120 S. Ct. 2446 (2000).

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[1] Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2476 (2000) (Stevens, J., dissenting) ("*Dale*").

[2] *See Founders of Scouting and the BSA, at* http://www.scouting.org/fact-sheets/02-211.html (last visited Apr. 7, 2001) (providing a history of scouting and biographies of key individuals responsible for the founding of BSA in the United States); *Historical Highlights – 1910's, at* http://www.scouting.org/fact-sheets/02-511/1910.html (last visited Apr. 7, 2001) (noting how the organization was first incorporated in Washington, D.C. in 1910 and describing its development over the first ten years); *see also* Nan D. Hunter, *Accommodating the Public Sphere*, 85 MINN. L. REV. (forthcoming 2001) (discussing the history of BSA, including the extent to which it has permeated modern American culture, and noting that "[t]here is probably no private organization in the country which

founded in 1910,[3] and was granted a federal charter in 1916.[4] Since its founding, more than eighty-seven million youths and adults have been active in BSA.[5] The success of BSA is due in large part to its membership, which says that "*[a]ny boy* between the ages of eleven and seventeen can join."[6] In fact, according to a BSA publication, *A Representative Membership*, "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of *any* boy."[7]

This explains why, when James Dale's membership from BSA was revoked because he was gay after twelve years of exemplary

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so promotes itself as an icon of citizenship as the Boy Scouts") (cited version on file with the *Journal of Law and Policy*) [hereinafter Hunter, *Accommodating the Public Sphere*].

[3] Dale v. Boy Scouts of America, 734 A.2d 1196, 1200 (1999) ("*Dale II*").

[4] 36 U.S.C. § 30901 (2000). "Congress has the power to create corporations as an appropriate means of executing powers conferred by the Constitution on it or on the general government or any department or officer thereof." 18 C.J.S. § 22 (1995). Further, the Constitution provides that Congress, "as the local legislature of the the [District of Columbia], has power, by special act or general laws, to create corporations within the District of Columbia." *Id.* BSA "is a body corporate and politic of the District of Columbia." 36 U.S.C. § 30901(a) (2000). Title 36, within which BSA is incorporated, is the "Patriotic and National Observances, Ceremonies, and Organizations." *Id.* The scope and authority of Title 36 is unclear, as one court has noted: "Since it is difficult to conceive of any express power underlying the congressional charter of incorporation for Little League Baseball, the charter is itself a tenuous exercise of federal power. Moreover, there being no underlying express power, the charter cannot be deemed intended to effectuate any substantive policy or purpose." Nat'l Org. for Women, Essex County Chapter v. Little League Baseball, 318 A.2d 33, 40 n. 4 (N.J. Super. Ct. App. Div. 1974). Currently, Title 36 includes charters for ninety organizations, including the Agricultural Hall of Fame, 36 U.S.C. § 20101 (2000), The American Legion, 36 U.S.C. § 21701 (2000), the Ladies of the Grand Army of the Republic, 36 U.S.C. § 130101 (2000), and The National Society of the Daughters of the American Revolution, 36 U.S.C. § 153101 (2000).

[5] *Dale II*, 734 A.2d at 1200.

[6] *Id.* at 1221 (emphasis added).

[7] *Dale II*, 734 A.2d at 1215 (emphasis added). As the court noted, "the booklet is emphatically inclusive." *Id.* The court went on to quote the booklet: "We have high hopes for our nation's future. These hopes cannot flower if any part of our citizenry feels deprived of the opportunity to help shape the future." *Id.* (quoting pamphlet, *A Representative Membership*).

service,[8] he sued them for violating New Jersey's public accommodation law, the Law Against Discrimination ("LAD").[9] In *Dale v. Boy Scouts of America* ("*Dale II*"),[10] the New Jersey Supreme Court unanimously sided with James Dale, holding that BSA was appropriately subject to the state's LAD, and thus its revocation of Dale's membership was unlawful.[11] In its 1999-2000 term, however, the United States Supreme Court decided *Boy Scouts of America v. Dale* ("*Dale*"), rejecting the New Jersey Supreme Court's interpretation of First Amendment law, and holding 5-4 that the LAD's application to BSA, in this context, was unconstitutional.[12]

The LAD is similar to other state public accommodation laws in that it defines "places of public accommodation" and then defines the groups that are protected from discrimination within those places.[13] The LAD uses a very broad and inclusive approach to define a "place of public accommodation,"[14] and the New

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[8] *Dale II*, 734 A.2d at 1204. "Dale was an exemplary scout." *Id. See infra* Part II (detailing James Dale's involvement with BSA).

[9] N.J. STAT. ANN. § 10:5-1 to -49 (West 1999). The LAD provides, in part, that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation." *Id.* § 10:5-4.

[10] 734 A.2d 1196 (1999).

[11] *Dale II*, 734 A.2d at 1230. "Today, we hold that Boy Scouts is a 'place of public accommodation' and is, therefore, subject to the provisions of the LAD." *Id.*

[12] *Dale*, 120 S. Ct. at 2449.

[13] *See generally* Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 22 N.Y.U. REV. L. & SOC. CHANGE 215, 238-72 (1978) (analyzing the variety of ways in which states have defined places covered and groups protected by the statutes).

[14] N.J. STAT. ANN. § 10:5-5 (West 1999). The statute begins by stating that, "'[a] place of public accommodation' shall include, but not be limited to . . ." *Id.* It then lists a broad range of businesses, locations, and types of activities. *Id.* This method is called the "qualified list" method, and is considered "a compromise between the vagueness of a general definition, and the rigidity of an unqualified list. It offers both flexibility and guidance." Lerman & Sanderson, *supra* note 13, at 243.

Jersey Supreme Court consistently has interpreted the definition broadly.[15] Further, the LAD has been updated regularly to broaden the classes of people that fall within its protective reach; in 1991, the New Jersey Legislature amended the LAD to include protection based on "affectional or sexual orientation."[16]

BSA's policy of limiting its membership had been subject to public accommodation law challenges before Dale brought suit under the LAD.[17] Prior to the New Jersey Supreme Court's decision that BSA qualified as a public accommodation under the LAD, however, no other state supreme court or federal jurisdiction had held that BSA was subject to a state public accommodation law.[18] This first-ever state supreme court holding that BSA was subject to a public accommodation law set the stage for the next chapter in the debate: whether application of a state public accommodation law to BSA would infringe on that organization's First Amendment freedom of association – a federal constitutional right.[19]

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[15] *Dale II*, 734 A.2d at 1208. "[T]he Legislature has directed that the LAD 'shall be liberally construed.' We have adhered to that legislative mandate by historically and consistently interpreting the LAD ''with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.''" *Id.* (quoting Andersen v. Exxon Co., 446 A.2d 486 (N.J. 1982) (quoting Passaic Daily News v. Blair, 308 A.2d 649 (N.J. 1973)).

[16] *Dale II*, 734 A.2d at 1200; *see also* N.J. STAT. ANN. § 10:5-4 (West 1999).

[17] Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993); Curran v. Mount Diablo Council, 952 P.2d 218 (Cal. 1998); Quinnipiac Council v. Comm'n on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987); Seabourn v. Coronado Area Council, 891 P.2d 385 (Kan. 1995); Schwenk v. Boy Scouts of America, 551 P.2d 465 (Or. 1976). *See generally* William F. Grady, *The Boy Scouts of America as a "Place of Public Accommodation": Developments in State Law*, 83 MARQ. L. REV. 517 (1999) (analyzing the various cases which have raised the question of whether BSA is a "place of public accommodation").

[18] *See* Grady, *supra* note 17, at 524-25.

[19] *See Dale II*, 734 A.2d at 1219. "Our holding that New Jersey's Law Against Discrimination applies to Boy Scouts requires that we reach Boy Scouts' claim that its First Amendment rights are thereby violated." *Id.* In previous actions brought against the BSA claiming protection under various public accommodation laws, BSA always maintained that application of those laws

In each of the previous occasions where state supreme courts addressed the issue, the United States Supreme Court was not poised to hear a further appeal, because the question turned specifically on the interpretation of a state statute.[20] As the United States Supreme Court has made clear, it will only reconsider state supreme court decisions when a federal question is raised: "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."[21]

After determining that BSA had violated the LAD when it revoked Dale's membership, the New Jersey Supreme Court then had to assess BSA's freedom of association argument: did forcing Dale's inclusion violate BSA's constitutional freedom of association. The court applied United States Supreme Court precedent on the First Amendment question,[22] finding that New Jersey's compelling state interest to eliminate illegal discrimination trumped the slight infringement to BSA's freedom of association.[23] On this question alone, the New Jersey Supreme Court decision was subject to review. The Supreme Court accepted *certiorari*[24] on the question of whether BSA's First Amendment freedom of association was unconstitutionally infringed upon because the New Jersey

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would infringe on its First Amendment freedom of association. *See, e.g.*, *Curran*, 952 P.2d at 239 ("In light of our conclusion that the judgment in favor of defendant should be sustained on the basis of the initial statutory interpretation issue, we have no occasion to pass upon the merits of the constitutional claims also made by defendant.").

[20] *See Dale*, 120 S. Ct. at 2456 n.3.

[21] Murdock v. City of Memphis, 87 U.S. 590, 626 (1874); *see also* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding that the Court will recognize jurisdiction to hear state supreme court opinions when the decision does not clearly depend "on bona fide separate, adequate, and independent grounds").

[22] The leading case in this area is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *See also infra* Part I.

[23] *Dale II*, 734 A.2d at 1230. "For the reasons set forth in this opinion, application of the LAD does not infringe on Boy Scouts' First Amendment rights." *Id. See also infra* Part I.B.

[24] Boy Scouts of America v. Dale, 120 S. Ct. 865 (2000) (granting BSA's request for *certiorari*).

Supreme Court found that BSA was within the scope of the LAD, and thus in violation of state law for excluding James Dale.[25]

The United States Supreme Court rejected the New Jersey Supreme Court's ruling, finding that BSA's freedom of association had been violated.[26] In the process, the *Dale* Court re-wrote the law of freedom of association.[27] The Court accepted an argument articulated by BSA that James Dale's membership would necessarily force them to propound the view that homosexuality is moral, holding that Dale's mere presence was sufficient to serve as a proxy for the acceptance of the morality of homosexuality. This aspect of the majority's opinion significantly confused the future of free speech and free association claims. In addition, the *Dale* Court ignored precedent, and accepted a type of discriminatory argument it had previously deemed unconstitutional. Chief Justice Rehnquist's majority opinion not only denied James Dale access to BSA – it constitutionalized the right to exclude gay men.

This Note focuses on this important constitutional concern. Part I discusses the development of United States Supreme Court First Amendment jurisprudence, looking in particular at the tension between the First Amendment and public accommodation laws, and analyzing in detail the law of freedom of association. Part II analyzes the procedural history of the *Dale* decision, focusing on the way the *Dale* Court reinterpreted Supreme Court precedent in reaching its conclusion. Part III discusses how the United States Supreme Court's handling of *Dale* resulted in the adulteration of prior First Amendment jurisprudence, and the creation of a new constitutional right to exclude gay men.

## I. THE TENSION: DISCRIMINATION MEETS THE CONSTITUTION

For many, the idea that the state has a right to tell a private organization who can claim access to its ranks seems to fly in the face of improper government control over the private actor. It is a

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[25] *Dale*, 120 S. Ct. at 2449 ("This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association.").

[26] *Id.*

[27] *See infra* Part II.C.

difficult conflict to resolve. Both sides in the disagreement have compelling interests at stake:[28] the organization wants to shape its own boundaries, and the state wants to eliminate "invidious discrimination" among its citizens.[29] "There is an inescapable tension between First Amendment rights of association and anti-discrimination laws."[30] As the states created and expanded their public accommodation laws,[31] and the courts recognized and articulated the freedom of association,[32] the conflict finally found its way to the United States Supreme Court in the *Roberts* trilogy.[33]

### *A. The History of Public Accommodation Laws*

State public accommodation laws similar to the LAD were first passed in the years following the Civil War.[34] These statutes were designed to prohibit "discrimination based on race and color in places which provided certain essential goods and services."[35] A

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[28] *Dale*, 120 S. Ct. at 2456.

[29] *See* Brief of Amicus Curiae State of New Jersey at 11, *Dale*, 120 S. Ct. 2446 (No. 99-699) ("In consistently holding that a state has a 'compelling interest of the highest order' in 'eliminating discrimination and assuring equal access to its citizens,' this Court has made clear that a state may define the scope of its compelling interest.").

[30] Brief of Society of American Law Teachers at 4, *Dale* 120 S. Ct. 2446 (No. 99-699).

[31] *See infra* Part I.A.

[32] *See infra* Part I.B.

[33] *See* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). Throughout this note, these cases collectively will often be referred to as the *Roberts* trilogy. *See also infra* Part I.C (documenting the development of the *Roberts* trilogy).

[34] *See* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 31-43 (documenting the history of public accommodation statutes in the United States); *see also* Lerman & Sanderson, *supra* note 13, at 238 (documenting the history of state public accommodation laws that gained urgency in the 1960s, when "demand for civil rights by activist groups" resulted in the passage of many federal and state anti-discrimination laws).

[35] Lerman & Sanderson, *supra* note 13, at 238.

federal statute, the Civil Rights Acts of 1875,[36] was the first attempt at a national public accommodation statute, but the United States Supreme Court eventually interpreted it to restrict only state action.[37] After nearly one hundred years, Congress passed the Civil Rights Act of 1964[38] to extend the federal government's public accommodation law beyond just the state action doctrine.[39] Thus, a complainant alleging discrimination in public accommodations can look to both federal and state law for protections.[40]

Most public accommodation statutes developed specifically to handle issues of race.[41] Over the years, however, many states broadened the scope of their public accommodation laws, similar to the expansion of New Jersey's LAD.[42] States have expanded their statutes in two ways: both increasing the concept of "place,"[43] and adding the numbers of groups covered by the anti-

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[36] Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

[37] Civil Rights Cases, 109 U.S. 3 (1883). "An individual wrongful act, unsupported by state authority in the form of law, custom, or judicial or executive proceedings was 'simply a private wrong, or a crime of the individual'; the person wronged had recourse only in the laws of the state." Lerman & Sanderson, *supra* note 13, at 219 (quoting Civil Rights Cases, 109 U.S. at 17).

[38] 42 U.S.C. § 2000 (2000). "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." *Id.* § 2000a(a).

[39] Lerman & Sanderson, *supra* note 13, at 219. The scope of the 1964 Act was broader in part because of Congress' success at extending federal legislation based on the Commerce Clause. "Title II was drafted to draw upon both fourteenth amendment and commerce clause authority." Lerman & Sanderson, *supra* note 13, at 220.

[40] *See, e.g.*, Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 33-34 (describing the scope of federal public accommodation statutes, and the varying degrees of protection of the state public accommodation statutes).

[41] *See* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 35 ("The era in which public accommodations law began and became common . . . was dominated by an ideology of race.").

[42] *See Dale*, 120 S. Ct. at 2456; *see also* Lerman & Sanderson, *supra* note 13.

[43] *Dale*, 120 S. Ct. at 2455-56 ("Over time, the public accommodations laws have expanded to cover more places.").

discriminatory effect.[44] This development, according to Chief Justice Rehnquist, brought about the imminent clash with the freedom of association: "As the definition of 'public accommodation' has expanded from clearly commercial entities . . . to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[45]

### B. *The Development of the Freedom of Expressive Association*

The United States Supreme Court has recognized a right to associate under the United States Constitution in some way since 1937 when the Court incorporated the First Amendment into the Fourteenth Amendment in *De Jonge v. Oregon*.[46] In *De Jonge*, the Court determined that "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental" – thus articulating an idea about "association" without using the explicit term.[47] This idea was furthered and enhanced in 1958 in *National Association for the Advancement of Colored People v. Alabama*.[48] Assessing whether it was constitutional to require a private organization to turn over its membership lists to the state, the Court stated unequivocally: "It is beyond debate that freedom to engage *in association* for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured

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[44] *Id.* at 2455 n.2 ("Public accommodations laws have also broadened in scope to cover more groups."); *see also* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 33-34 ("As to the scope of who is protected, state law prohibits three major bases for discrimination that federal law does not. The most common is sex discrimination, which is banned by 43 state statutes. Of those 43 laws, 10 also prohibit sexual orientation discrimination.") (citations ommitted).

[45] *Dale*, 120 S. Ct. at 2456. "Chief Justice Rehnquist suggests strongly in his opinion for the Court that the conflict is unnecessary, that the Boy Scouts should never have been covered by the New Jersey statute in the first place, that public accommodations laws should stick to their traditional focus." Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 31.

[46] 299 U.S. 353, 364 (1937).

[47] *Id.*

[48] 357 U.S. 449 (1958).

by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[49] Consequent to this right of association is the freedom not to associate, which the Court recognized in *Abood v. Detroit Board of Education*.[50] The Court also has recognized a right of intimate association flowing from the Bill of Rights,[51] which is often analyzed as a part of the freedom of association, generally.[52]

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[49] *Id.* at 460 (emphasis added); *see* NAACP v. Button, 371 U.S. 415, 430 (1962) ("[T]here is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity."); Bates v. Little Rock, 361 U.S. 516, 523 (1960) ("[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."); *see also Roberts*, 468 U.S. at 622-23 ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

[50] 431 U.S. 209, 233-34 (1977). "Equally clear [as the freedom of association] is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment." *Id.* at 234.

[51] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1118 (5th ed. 1995) [hereinafter NOWAK & ROTUNDA]; *see also* Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. CIV. RTS. L.J. 111 (1997-98). The concept of a right of intimate association was first recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1964) (finding a "penumbra" of privacy that protects the right of married couples to access contraceptives). The Court ultimately narrowed the types of intimate relationships protected to "those that attend the creation and sustenance of a family," *Roberts*, 486 U.S. at 619; including marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the right to marry is fundamental); childbirth, *Carey v. Populations Services International*, 431 U.S. 678 (1977) (holding that it is a fundamental right to decide whether to procreate); and cohabitation with one's relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977) (holding that the right of a non-nuclear family is a cognizable liberty interest). Factors that have been used to determine what is and is not an "intimate association" include: size, purpose, policies, selectivity and congeniality. *See Roberts*, 486 U.S. at 620. The Court has not recognized a new category of intimate association since 1978, when it found that marriage is a fundamental right. *Zablocki*, 434 U.S. at 374.

[52] *See, e.g., Roberts*, 486 U.S. at 618-22.

The freedom of association flowing from the First Amendment is not absolute, however.[53] The Supreme Court has held that the government is justified in imposing certain limitations on private organizations when "regulations [are] adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[54] Although the early ideas were developed as far back as the 1930s, and more thoroughly in the 1950s, it was not until the 1980s that the conflict between the freedom of association and application of state public accommodation laws made its way to the United States Supreme Court.

### C. *The Intersection: First Amendment Protection and Public Accommodation Laws*

If the First Amendment is the proverbial rock, state public accommodation laws are the hard place – and courts are the intermediary responsible for determining either's primacy. This "classic conflict[] in constitutional law: the tension between equality and freedom,"[55] has been brewing in the courts for over two decades.[56] As the scope of public accommodations laws has expanded, so has the number of groups and institutions affected by them.[57] Eventually, the issue reached the United States Supreme Court.

The first case that made it to the Supreme Court was *Roberts v. United States Jaycees*,[58] in 1984. The Jaycees claimed that the forced inclusion of women, mandated by the Minnesota Human Rights Act, violated its First Amendment right of association.[59]

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[53] *Dale*, 120 S. Ct. at 2451 ("But the freedom of expressive association, like many freedoms, is not absolute."); *Roberts*, 468 U.S. at 623 ("The right to associate for expressive purposes is not, however, absolute.").

[54] *Roberts*, 486 U.S. at 623.

[55] Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1.

[56] *See generally Roberts*, 468 U.S. at 612; *see also* Part I.C.1-4.

[57] *See, e.g.*, *Dale*, 120 S. Ct. at 2455-56 (discussing the expanding scope of public accommodation laws).

[58] 468 U.S. 609 (1984).

[59] *Id.* at 612.

The second case to make it to the Supreme Court, *Rotary International v. Rotary Club of Duarte*,[60] also involved the exclusion of women, this time from a local chapter of Rotary International.[61] The Supreme Court's decision in *New York State Clubs Association v. City of New York*,[62] upholding a facial challenge to a citywide public accommodation law, represented the third case in what has since become known as the *Roberts* trilogy.[63] Finally, the Court decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[64] suggesting a possible change to the fairly settled law of the *Roberts* trilogy.

### *1. Foundations of Supreme Court Precedent: The* Roberts *Trilogy*

In *Roberts v. United States Jaycees*,[65] the United States Supreme Court articulated a balancing test for courts to apply when assessing constitutional challenges to applications of state public accommodation laws. The case involved two local chapters of the Jaycees – another name for Junior Chamber of Commerce – in Minneapolis and St. Paul, Minnesota.[66] In 1974 and 1975, respec-

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[60] 481 U.S. 537 (1987).

[61] *Id.*

[62] 487 U.S. 1 (1988).

[63] *See New York State Club Ass'n*, 487 U.S. at 1; *Rotary*, 481 U.S. at 537; *Roberts*, 468 U.S. at 609. Throughout this note, these cases collectively will often be referred to as the *Roberts* trilogy.

[64] 515 U.S. 557 (1995).

[65] 468 U.S. 609 (1984).

[66] *Id.* at 612. According to the Jaycees' bylaws:

> [T]he objectives of the Jaycees . . . is to pursue: "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization 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."

*Id.* at 612-13 (quoting the Jaycees' bylaws from the Appellee's Brief).

tively, these local chapters began admitting women as regular members.[67] According to the bylaws of the national Jaycees, "regular" membership was limited to "young men between the ages of 18 to 35."[68] Women were allowed to join, but only as associate members, which did not allow them to "vote, hold local or national office, or participate in certain leadership training and awards programs."[69]

In December of 1978, the national board of Jaycees ("Jaycees") notified the two Minnesota chapters that a motion would be raised at the next national board meeting to revoke their charters.[70] In response, the local chapters filed charges with the Minnesota Department of Human Rights ("MDHR"), alleging that a revocation of their charters by the Jaycees constituted a violation of the Minnesota Human Rights Act ("Minnesota Act").[71] The MDHR found that the Jaycees were a "public accommodation" as defined by the Minnesota Act, and that they were in violation of the Minnesota Act for excluding women from general membership. The Jaycees were ordered to cease and desist from taking any action against the local chapters.[72]

The Jaycees filed a suit in federal district court in Minnesota, seeking injunctive relief from the MDHR's order. The district court first certified the question to the Minnesota Supreme Court as to

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[67] *Id.* at 614. At the time of the trial, women associate members made up "about two percent of the Jaycees' total membership." *Id.* at 613.

[68] *Id.* at 613.

[69] *Id.*

[70] *Id.* at 614. In the ten years between the local chapters' decisions to allow women and the case coming before the Supreme Court, women made up a "substantial portion" of the memberships and boards of directors of both organizations. *Id.*

[71] MINN. STAT. ANN. § 363.03 (1982). The Minnesota Human Rights Act provided, in part: "It is 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." *Id.* § 363.03(3)(a)(1). The current version of this provision includes "marital status" and "sexual orientation" among the list of protected classes in this section of the Act. MINN. STAT. ANN. § 363.03(3)(a)(1) (1999). For a thorough history of the Act, see *United States Jaycees v. McClure*, 305 N.W.2d 764, 766-68 (Minn. Sup. Ct. 1981).

[72] *Roberts*, 468 U.S. at 616.

whether the Jaycees were a "public accommodation" under Minnesota law.[73] Upon an affirmative answer from the Minnesota Supreme Court, the district court denied the Jaycees' application for injunctive relief.[74] The Eighth Circuit Court of Appeals reversed, reasoning that the "advocacy of political and public causes" of the Jaycees was "not insubstantial," and thus, altering their membership scheme was an infringement of their freedom of association.[75] The court held that the change in the membership policies operated a "direct and substantial" interference with that freedom because it would "necessarily result in 'some change in the Jaycees' philosophical cast."[76] Further, the court held that the state's interest was not "sufficiently compelling" to outweigh the constitutional rights of the Jaycees, and that there were "less

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[73] *See McClure*, 305 N.W.2d 764. "What we decide here is that an organization engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state is a 'public business facility.'" *Id.* at 774.

[74] United States Jaycees v. McClure, 534 F. Supp. 766 (D. Minn. 1982) ("*Jaycees I*").

[75] United States Jaycees v. McClure, 709 F.2d 1560, 1570 (8th Cir. 1983) ("*Jaycees II*").

[76] *Roberts*, 468 U.S. at 617 (quoting *Jaycees II*, 709 F.2d at 1571-72).

intrusive" ways for the state to accomplish its anti-discrimination goals.[77]

The United States Supreme Court reversed in favor of the two Minnesota chapters.[78] In an extremely deliberate decision, the Court set out the foundations upon which the constitutional freedom of association relies. The Court first considered, and then quickly dismissed, the possibility that the Jaycees qualified for constitutional protection as an intimate association.[79] The Court then defined the parameters within which a state public accommodation law can operate without infringing on a group's freedom of expressive association.[80]

The Court first credited the legitimacy of the state's objectives in outlawing discrimination against minorities and recognized that

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[77] *Id.* The Eight Circuit Court of Appeals suggested a number of ways that the state could "express its displeasure with the Jaycees' discriminatory membership practice, ways less directly and immediately intrusive on the freedom of association." *Jaycees II*, 709 F.2d at 1573-74. These included:

> State officials could be instructed not to appear at any function of any discriminatory club, not to do any business with such a club, and to give no official recognition to it. State officials and employees, at least those above a certain level, could be instructed not to join such a club. Those who seek public office or preferment may validly be required to accept it cum onere, to divorce themselves from groups or activities that indulge in invidious discrimination. Any state tax concessions, e.g., the deduction for charitable contributions, could be withdrawn. It could be made unlawful (indeed, it may be already) for an employer to subsidize an employee's membership in any discriminatory club, or to give that membership any favorable weight in deciding whether to promote an employee.

*Id.*

[78] *Roberts*, 468 U.S. at 612.

[79] *Id.* at 618-22. The Court looked to the relevant factors, including "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* at 620. Because the Jaycees "are large and basically unselective groups," and that an officer from one of the two Minnesota chapters testified that "he could recall no instance in which an applicant had been denied membership on any basis other than age or sex," the Court determined that "Jaycees chapters lack the distinctive characteristics that might afford constitutional protection" under the intimate association prong of freedom of expression. *Id.* at 621.

[80] *Id.* at 622-29.

public accommodation laws play a role in accomplishing this goal.[81] The Court then noted a comparable argument in support of laws protecting minorities, referring to its various decisions under the Equal Protection Clause.[82] There, the Court articulated an approach to judicial review that recognized how "archaic and overbroad assumptions" relied upon in the formulation of many laws were not sound bases upon which to justify discrimination.[83] Thus, if in response to a public accommodation law challenge an organization claimed First Amendment protection and then relied on "archaic and overbroad assumptions"[84] to justify the discriminatory behavior, the state's compelling interest in overcoming the discrimination would be especially strong.[85]

With the burden for proving justification for the discrimination on the Jaycees, the Court found that "the Jaycees . . . failed to demonstrate that the [Minnesota] Act imposes any serious burdens on the male members' freedom of expressive association."[86]

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[81] *Id.* at 622-25. These laws, as the Court noted, are not "limited to the provision of purely tangible goods and services." *Id.* at 625. The Court then affirmed the general and broad scope of the Minnesota Act, acknowledging that its "expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626.

[82] *Id.* at 625. The Court cited to *Heckler v. Mathews*, 465 U.S. 728, 751 (1984) (holding that a pension offset plan for dependent husbands was constitutional because it "directly and substantially related to [an] important governmental interest"); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 733 (1982) (holding that a women only policy at the university's nursing school was invalid); and *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (holding that classifications based on sex are "inherently suspect" and subject to "strict judicial scrutiny").

[83] *Roberts*, 468 U.S. at 625.

[84] *Id.*

[85] *Id.* ("That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

[86] *Id.* at 626. "There is . . . 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." *Id.* at 627.

Further, the Court concluded that all of the arguments proposed by the Jaycees were in fact based on "archaic and overbroad assumptions" and thus invalid: "In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations . . . the Jaycees relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women."[87] The Court responded severely: "We have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions . . . [and] we decline to indulge in the sexual stereotyping that underlies [the Jaycees'] contention."[88]

Finally, the Court acknowledged that application of the state anti-discrimination law would impose a burden on the Jaycees, but noted it "abridge[d] no more speech or associational freedom than [was] necessary to accomplish [the state's legitimate] purpose."[89] With broad strokes, the Court found that the Jaycees' limitation on accepting women as "general members" was not a constitutionally protected form of discrimination,[90] and that forcing the Jaycees to accept women as full members did not infringe upon the Jaycees' First Amendment right to associate.[91]

Justice O'Connor's lone concurrence approached the issue from a different perspective.[92] Justice O'Connor argued that it was a better approach to interject into the analysis a threshold question:

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[87] *Id.* at 627-28.

[88] *Id.* at 628. "In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech." *Id.*

[89] *Id.* at 629. The Court noted that the provision "responds precisely to the substantive problem which legitimately concerns" the state. *Id.* (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)).

[90] *Roberts*, 468 U.S. at 628."[L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection." *Id.*

[91] *Id.* at 612.

[92] *Id.* at 631 (O'Connor, J., concurring). Justice Brennan wrote the Court's majority opinion. Justice Rehnquist concurred in the judgment only. Chief Justice Berger and Justice Blackmun took no part in the decision. *Id.* at 609.

is the organization claiming First Amendment protection predominantly commercial or expressive in its activities?[93] Justice O'Connor conceded that this determination can be a difficult one.[94] The benefit to this approach, however, comes after the determination is made: if the organization is commercial, then there is no need to undertake an extensive First Amendment analysis, since "there is only minimal constitutional protection of the freedom of commercial association."[95] Under her simplistic analysis, *Roberts* is an easier case: "[n]otwithstanding its protected expressive activities, the Jaycees – otherwise known as the Junior Chamber of Commerce – is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management."[96] Thus, in response to Justice O'Connor's threshold question, the Jaycees would lose its First Amendment protection claim because it is a commercial organization and the state's compelling interest would overwhelm.[97]

### 2. *The* Roberts *Trilogy, Part II*

In *Rotary International v. Rotary Club of Duarte*,[98] the second case in the *Roberts* trilogy, the United States Supreme Court

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[93] *Id.* at 633.

[94] *Roberts*, 468 U.S. at 636. "Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive." *Id.*

[95] *Id.* at 634.

[96] *Id.* at 639.

[97] *Id.* "The State of Minnesota has a legitimate interest in ensuring nondiscriminatory access to the commercial opportunity presented by the membership in the Jaycees. The members of the Jaycees may not claim constitutional immunity from Minnesota's antidiscrimination law by seeking to exercise their First Amendment rights through this commercial organization." *Id.* at 640. *See also* NOWAK & ROTUNDA, *supra* note 51, at 1121. The authors of this well-respected hornbook favor Justice O'Connor's theory. "Perhaps it is best to think of associational rights as proceeding on a continuum from the least protected form of association in commercial activities to the most protected forms of association to engage in political or religious speech or for highly personal reasons, such as family relationships." NOWAK & ROTUNDA, *supra* note 51, at 1121.

[98] 481 U.S. 537 (1987).

considered a factual scenario comparable to *Roberts*, and the results were remarkably similar.[99] The Rotary Club of Duarte, California, admitted three women into active membership in 1977.[100] When Rotary International's board of directors threatened to revoke its charter, the Duarte Club and two of the women members filed a complaint with the California Superior Court under the Unruh Civil Rights Act ("Unruh Act"), the state's public accommodation law.[101] At trial, the court held that Rotary did not qualify as a "business establishment" under the Unruh Act.[102] The court of appeal reversed, and the California Supreme Court denied a petition for review.[103]

The United States Supreme Court granted *certiorari*, recognizing that application of the Unruh Act might implicate Rotary's First Amendment rights,[104] and affirmed the court of appeal decision

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[99] One commentator suggests that the Court took up *Rotary* in response to criticisms of *Roberts*, "for its inadequate definition of the contours of the right of association." Robert N. Johnson, Board of Directors of Rotary International v. Rotary Club of Duarte: *Redefining Associational Rights*, 1988 B.Y.U. L. REV. 141, 141 (1988).

[100] *Rotary*, 481 U.S. at 541. Rotary International is "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." *Id.* at 539. Although its membership was limited to men, women were permitted to attend meetings, give speeches, and receive awards. There were two Rotary-affiliated organizations to which young women between fourteen and twenty-eight were allowed to join – Interact or Rotaract. *Id.* at 541.

[101] CAL. CIV. CODE ANN. § 51 (West 1982). The Unruh Act provides in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*

[102] *Rotary*, 481 U.S. at 542. The court found that any business benefits derived by Rotary clubs "are incidental to the principal purposes of the association." *Id.*

[103] *Id.* at 543.

[104] *Id.* at 543-44 & n.3. "We have appellate jurisdiction to review a final judgment entered by the highest court of a State in which decision could be had 'where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution." *Id.* at 544 n.3 (citations omitted).

matter-of-factly.[105] After dismissing the possibility that Rotary was protected under the intimate association prong of the freedom of association,[106] the Court analyzed the nature of the club's First Amendment claim. At the outset, the Court determined that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[107] Again, the Court framed the issue deliberately: the organization claiming a First Amendment protection has the burden of proving that its expressive purpose would be compromised by application of the state law. In this case, according to the Court, opening the club's membership to women would improve Rotary's abilities to accomplish its stated purposes.[108] Finally, in language affirming the rationale of *Roberts*, the Court held that, to the extent any infringement was placed on Rotary's expressive purpose, such infringement was justified by the state's compelling interest in fighting discrimination.[109]

Justice O'Connor's absence in this decision was unfortunate.[110] Justice O'Connor likely would have elaborated more fully her "predominantly commercial" analysis. Rotary developed its membership by pulling individuals from various professions, who then sponsored other individuals from the same line of business.[111] Rotary's purposes, however, were described as far more

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[105] *Id.* at 544; *see also* Johnson, *supra* note 99, at 141 (suggesting that the Court granted *certiorari* on *Rotary* at least in part to clarify its holding in *Roberts*).

[106] *Rotary*, 481 U.S. at 545-47. "We therefore conclude that application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members' freedom of private association." *Id.* at 547.

[107] *Id.* at 548.

[108] *Id.* at 549; *see also supra* note 100 (describing Rotary's purpose).

[109] *Rotary*, 481 U.S. at 549. "Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.*

[110] Justices O'Connor and Blackmun did not take part in this decision. *Id.* at 538. The decision, in fact, was unanimous, although Justice Scalia concurred only in the judgment. *Id.*

[111] *Id.* at 540 (citing the Standard Rotary Club Constitution, Art. V, §§ 2-5).

expressive in nature than the Jaycees.[112] How Justice O'Connor would have evaluated this less obvious "commercial" organization would have been instructive for elaborating on her alternative theory.[113]

### 3. Roberts *Trilogy, Part III*

In the third case in the *Roberts* trilogy, *New York State Club Association v. City of New York* ("*NY Clubs*"),[114] the Supreme Court was asked to consider a facial challenge to a city ordinance that applied a public accommodation anti-discrimination scheme to any club with "more than four hundred members, [which] provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business."[115] The challenge was brought by a statewide association of more than 125 clubs, some of which fell within the parameters of the city ordinance, Local Law 63.

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[112] *Id.* at 546.

> We of course recognize that Rotary Clubs, like similar organizations, perform useful and important community services. Rotary Clubs in the vicinity of the Duarte Club have provided meals and transportation to the elderly, vocational guidance for high school students, a swimming program for handicapped children, and international exchange programs, among many other service activities.

*Id.* at n.5.

[113] *See supra* text accompanying notes 92-97 (discussing Justice O'Connor's concurrence in *Roberts*).

[114] 487 U.S. 1 (1988).

[115] N.Y.C. ADMIN. CODE § 8-102(9) (McKinney 1986). Local Law 63, as the law was known, was an amendment to New York City's Human Rights Law of 1965, N.Y.C. ADMIN. CODE § 8-107 (McKinney 1986). The purpose of the amendment was to ensure that minorities and women have access to the broad scope of public accommodations in the city. *Id.* "One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancements are formed." *Id.* § 8-102.

The Supreme Court rejected the facial challenge, and in doing so, the Court further defined the *Roberts* approach.[116] Explaining that the law was not invalid in all circumstances, the Court noted:

> It is conceivable, of course, that an association might be able to show that it is organized for *specific expressive purposes* and that it *will not be able to advocate its desired viewpoints nearly as effectively* if it cannot confine its membership to those who share the same sex, for example, or the same religion.[117]

This interpretation of the *Roberts* doctrine made it clear that in order for a First Amendment challenge to trump a valid public accommodation law, the "expressive purpose" of the organization must be compromised.[118] When a law, however, "erects no obstacle" in the fulfillment of that expressive purpose, then the First Amendment will not protect the club.[119]

In her concurrence, Justice O'Connor applauded Local Law 63 as a "sensitive tool[]" in balancing the goals of public accommodation laws and First Amendment rights.[120] Justice O'Connor maintained her commercial/expressive purpose distinction, however. She recognized that there might be clubs with more than 400 members "whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who

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[116] *NY Clubs*, 487 U.S. at 8.

> [T]o prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties."

*Id.* at 11 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984)).

[117] *Id.* at 13 (emphasis added).

[118] *See Roberts*, 468 U.S. at 623.

[119] *NY Clubs*, 487 U.S. at 13. "Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Id.*

[120] *Id.* at 18 (O'Connor, J., concurring).

share some other such common bond."[121] Likewise, "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right" regardless of their size.[122] Interestingly, however, the Court again did not rely on this distinction in the majority's holding.[123]

### 4. *How* Hurley *Altered the Landscape*

After *NY Clubs*, the *Roberts* doctrine went unchallenged for several years. In fact, it was relied on heavily in the state court proceedings of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* ("*Hurley*").[124] The case involved the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"), which purportedly formed solely to march in the annual Boston St. Patrick's Day parade.[125] In 1992, the group's request to participate in the parade was initially rejected by parade organizers, the South Boston Allied War Veterans Council ("Council").[126] GLIB eventually obtained a court order allowing it to march, however. In 1993, GLIB was again not allowed to march, and filed a lawsuit

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[121] *Id.* at 19. "The associational rights of such organizations must be respected." *Id.*

[122] *Id.* at 20.

[123] *Id.* at 1.

[124] 515 U.S. 557 (1995); *see also* Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1298-99 (Mass. 1994); Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, No. 921518, 1993 WL 818674, at *12-13 (Mass. Dist. Ct. Dec. 15, 1993).

[125] *Hurley*, 515 U.S. at 561. *But see* Gretchen Van Ness, *Parades and Prejudice: The Incredible True Story of Boston's St. Patrick's Day Parade and the United States Supreme Court*, 30 NEW ENG. L. REV. 625 (1996). Ms. Van Ness was counsel to GLIB, and argued that the trial court made no such finding about GLIB's formative purpose. *Id.* at 652.

[126] *Hurley*, 515 U.S. at 561. The Veterans Council, "an unincorporated association of individuals elected from various South Boston veterans groups," began its stewardship over the parade in 1947, when the city gave up that responsibility. *Id.* at 560. The Council applies for and receives a permit from the city each year, and the city in turn allows usage of its official seal, and provides printing services and direct funding. *Id.* at 561.

against the Council and John J. Hurley, a member of the Council, individually.[127]

The trial court held for GLIB, finding that the parade was a covered entity under the state's public accommodation law,[128] and thus the exclusion of GLIB was unlawful.[129] The court further held that, since the expressive purpose of the parade was not discernible with any specificity, there was no infringement of the Council's First Amendment freedom of expressive association by allowing GLIB to march.[130]

On appeal, the Supreme Judicial Court of Massachusetts ("SJC") affirmed, finding no error on the part of the trial court, and noting "that it was impossible to detect an expressive purpose in the parade."[131] The SJC held that because there was no "specific expressive purpose," there was no infringement of any protected First Amendment right.[132] The Council's appeal raised a freedom of speech claim in addition to its expressive association claim litigated at trial.[133] The majority ignored the new free speech claim, determining that it was unnecessary to "decide on the particular First Amendment theory involved."[134] It was sufficient, the court held, that "defendants had . . . failed at the trial level 'to

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[127] The lawsuit named John J. "Wacko" Hurley, the named defendant in the Supreme Court decision – hence the case's name. *Id.*

[128] MASS. GEN. LAWS § 272 (1992) (prohibiting "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement").

[129] *Hurley*, 515 U.S. at 563.

[130] *Id.* "[T]he court found it 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" *Id.* (quoting Application to Petition for Certiorari at B25).

[131] *Id.* at 564 (citing Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1295-98 (1994)). The original claim made by GLIB also named the city of Boston as defendant, but that claim was dismissed by the trial court judge. *Id.* at n.2.

[132] *Id.* at 564.

[133] *Id.*

[134] *Id.*

demonstrate that the parade truly was an exercise of . . . First Amendment rights.'"[135]

Judge Nolan, the sole dissenter, disagreed with the court's assessment of Hurley's speech rights.[136] In an opinion that ultimately had a significant impact on the United States Supreme Court, Judge Nolan argued that even without any message, the Council could not be forced to accept GLIB's message as its own.[137] This positional switch – moving from traditional "expressive association" analysis of the *Roberts* trilogy, toward the more traditional "pure speech" jurisprudence championed by Judge Nolan's dissent – set the stage for the Supreme Court's analysis.[138]

After documenting the long history of *Hurley*, the United States Supreme Court broadcast its intentions early by articulating the question under consideration in free speech terms: "Whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment."[139] The Court unanimously reversed the SJC's decision and held invalid the "peculiar way" in which the state's public accommodation law had been applied.[140] Thus, despite the fact that the original claim was based on the freedom of expressive association, the Court analyzed the facts using a free speech framework.

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[135] *Hurley*, 515 U.S. at 564 (quoting Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d at 1299).

[136] *Id.* at 565 (Nolan, J., dissenting).

[137] *Id.* "[E]ven if the parade had no message at all, GLIB's particular message could not be forced upon it." *Id.* (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

[138] *See infra* Part III.A.2 (analyzing the difference between a traditional free speech claim, and an expressive association claim).

[139] *Hurley*, 515 U.S. at 566 (citing the Supreme Court's granting of *certiorari*, 513 U.S. 1071 (1995)). It is worth noting that the presentation of the issue for determination immediately followed the lengthy Nolan dissent. *See id.*

[140] *Id.* at 572. "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." *Id.* at 572-73.

The core of the Court's decision was its interpretation of the unique nature of the parade.[141] The Court stated that, as a matter of law, parades are "a form of expression."[142] This finding undermined the trial court's decision, which relied on the notion that the parade, missing any articulable message, could not be a form of expression protected by the First Amendment.[143] The Court elaborated that, in relation to the First Amendment protections that should extend to parades, "a narrow, succinctly articulable message is not a condition of constitutional protection."[144] The most obvious parallel for this argument is to First Amendment protections of newspapers or cable television providers.[145] In both

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[141] "Real '[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 communication and consideration.'" *Id.* at 568 (citing SUSAN DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

[142] *Id.* at 568. "Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches." *Id.*

[143] *Id.* at 563.

[144] *Id.* at 569. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70. This holding would prove troubling for successive freedom of expressive association claims, including *Dale*, because it complicated the apparently consistent holdings of the *Roberts* trilogy. At the core of the expressive association constitutional protection is the argument that what is being protected is the very reason the association exists to begin with: namely, the purpose behind the formation of the group. This purpose, which the trial court in *Hurley* tried to determine for the parade, is a precursor to the existence of an associational protection under the First Amendment. If *Hurley* is consistently read to make this requirement unnecessary for an associational protection after *Dale*, then the strength of the *Roberts* doctrine is seriously weakened. *See infra* Part III.B; *see also* Kristine M. Zaleskas, *Pride, Prejudice or Political Correctness? An Analysis of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 29 COLUM. J.L. & SOC. PROBS. 507, 547-48 (1996) (observing that "there now seems to be more confusion than before about how much of a message is necessary to assert a right of 'expressive association'").

[145] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that Florida's compulsory access law "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors"); Turner

instances, government can claim no right to force the inclusion of any particular "voice" or "speech" that either entity would not want to include.[146]

This line of cases stems from free speech jurisprudence, and not from freedom of expressive association case law. When the Court acknowledged that a "speaker" has the right not to have his speech altered, regardless of whether that speaker has a "particularized message," it was invoking not the guidelines set forward in the *Roberts* trilogy, but rather, those bedrock cases that rely upon the freedom of speech.[147] Even in supporting the argument, the Court referred to the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[148] This clearly took *Hurley*'s holding out of the context of freedom of association.[149]

Throughout its opinion, the Court had barely acknowledged the *Roberts* doctrine.[150] Finally, in the penultimate paragraph, the Court invoked *NY Clubs*.[151] In dicta, the Court recognized that *NY Clubs* had upheld a facial challenge to a city public accommodation statute, but the Court also had held that "the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships."[152] The Court thus expressed the *Roberts* balancing test in yet another way: where the "manifest views" of an individual are "at odds *with a*

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Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (holding that cable programmers and operators are "entitled to the protection of the speech and press provisions of the First Amendment").

[146] *Id.*

[147] *See, e.g.*, *Tornillo*, 418 U.S. at 258 (1974) (newspapers have a right to claim freedom of speech); *Turner Broad. Sys.*, 512 U.S. at 636 (1994) (cable programmers and operators are entitled to freedom of speech).

[148] *Hurley*, 515 U.S. at 569.

[149] *See supra* Part I.C.1-3; *see also Dale III*, 706 A.2d at 292 ("*Hurley* is a First Amendment speech case . . . the Court was protecting a form of pure speech, the collective expressive views of the parade itself.").

[150] Each of the Court's citations to the *Roberts* trilogy were for points of information, and not to support its rationale in deciding *Hurley*. *See Hurley*, 515 U.S. 557.

[151] *Hurley*, 515 U.S. at 580. "*New York State Club Assn.* is also instructive *by the contrast* it provides." *Id.* (emphasis added).

[152] *Id.* (citing *NY Clubs*, 487 U.S. at 13).

*position taken by the club's existing members*," the club has a First Amendment right to exclude that individual.[153]

## II. BSA JETTISONS ONE OF ITS OWN: AN EAGLE SCOUT

James Dale joined the Cub Scouts in 1978, when he was eight years old.[154] He became a Boy Scout in 1981 and remained with the Scouts until his eighteenth birthday in 1988. In his ten years as a Scout, Dale earned twenty-five merit badges and was granted many honors.[155] Just before leaving the Scouts at the age of eighteen, Dale was awarded the Eagle Scout Badge, an honor achieved by only the top three percent of all scouts.[156] Dale then applied for and was granted membership in BSA as an Assistant Scoutmaster of Monmouth Council Troop 73, where he had been

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[153] *Id.* at 581 (emphasis added).

[154] *Dale II*, 734 A.2d at 1204. Dale first joined Cub Scout Pack 142. *Id.* In 1981, he became a member of the Boy Scout Troop 220. He joined Troop 128 in 1983, and Troop 73 in 1985, where he remained until his eighteenth birthday. *Id.*

[155] *Id.* While a member, Dale was an assistant patrol leader, patrol leader, and bugler. *Id.* From 1985 to 1988, when he turned eighteen, he was a Junior Assistant Scoutmaster for Troop 73. *Id.* Dale was invited to speak at "organized Boy Scout functions," including the Joshua Huddy Distinguished Citizenship Award Dinner. *Id.* He also attended the National Boy Scout Jamboree. *Id.* Jamborees are national gatherings of scouts held periodically which have as their goal to "reflect the skills of Scouting, the nation's heritage, physical fitness, conservation, and the spirit of brotherhood." *2001 National Scout Jamboree, Program Activities*, *at* http://www.scouting.org/jamboree/program.html (last visited Apr. 8, 2001).

[156] *Dale II*, 734 A.2d at 1204; *see also* BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK 179 (11th ed. 1998) (noting that "[f]ewer than 4% of all Scouts earn the Eagle rank – a testament to its high standards") [hereinafter HANDBOOK]; *see also Eagle Scouting*, *at* http://bsa.scouting.org/factsheets/02-516.html (last visited Apr. 8, 2001) ("The award is a performance-based achievement whose standards have been well-maintained over the years. . . To earn the Eagle Scout rank, the highest advancement rank in Scouting, a Boy Scout must fulfill requirements in the areas of leadership, service, and outdoor skills.").

a member prior to turning eighteen.[157] He served in this capacity for approximately sixteen months.[158]

While attending Rutgers University, Dale acknowledged to himself, his friends and his family that he was gay.[159] He joined the Rutgers University Lesbian/Gay Alliance,[160] eventually becoming the group's co-president.[161] While attending a seminar addressing the needs of gay and lesbian teenagers, Dale was interviewed by a reporter for the New Jersey *Star-Ledger*.[162] On July 8, 1990, an article appeared in the *Star-Ledger* that included a photograph of Dale, with a caption identifying him as "co-president of the Rutgers University Lesbian/Gay Alliance."[163]

A few weeks after the article was published, Dale received a letter from Monmouth Council Executive James W. Kay, instructing Dale to "sever any relations [he] may have with the Boy Scouts of America."[164] Dale wrote a letter requesting the basis for the Council's revocation of his membership.[165] In response he received another letter from Kay dated August 10, 1990, stating that his membership revocation was grounded in "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals."[166]

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[157] *Dale II*, 734 A.2d. at 1204.

[158] *Id.*

[159] *Id.*

[160] *See The BiGLARU: History, Aims and Goals*, *at* http://mariner.rutgers.edu/biglaru/what.htm (last visited Apr. 22, 2001) (describing the history of Rutgers' Bisexual, Gay and Lesbian Alliance).

[161] *Dale II*, 734 A.2d at 1204.

[162] *Id.* at 1204-5.

[163] *Id.* at 1204-5; *see also* Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, § 2, at 11.

[164] *Dale II*, 734 A.2d at 1205. The letter also stated that Dale had sixty days to request a review of his termination. *Id.*

[165] *Id.* Dale's letter was dated Aug. 8, 1990. *Id.*

[166] *Id.* As the *Dale II* court further noted:

> Dale subsequently learned that in 1978 BSA had prepared a position paper stating that "an individual who openly declares himself to be a homosexual [may not] be a volunteer scout leader [or] . . . a registered unit member[.]" The position paper "was never distributed." Statements were also written in 1991 and 1993 expressing similar positions. These statements were written after the onset of litigation in other states

Dale responded with a request to see a copy of the "standards of leadership" referred to in Kay's second letter, and for the opportunity to attend a hearing to challenge his membership revocation.[167] After a second request for the standards went unanswered,[168] Dale received a notice that the Northeast Region BSA Review Committee supported his membership revocation, and that he would have thirty days to request a review with the National Council Review Committee.[169] When Dale, through counsel, requested the opportunity to attend a review of his revocation before the National Committee,[170] he was informed that BSA "does not admit avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting."[171] In response, Dale filed a lawsuit against BSA, alleging that his membership revocation was a violation of New Jersey's public

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charging the organization with discrimination against members on the basis of sexual orientation.

*Id.* at n.4. The "litigation in other states" involved Timothy Curran, another Eagle Scout whose request for admission as an assistant scoutmaster was rejected "after [Curran] publicly stated that he is a homosexual." Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 219 (Cal. 1998). The *Curran* complaint was first filed in 1980. Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 717 (Cal. App. Dep't 1983). The California Court of Appeals held that Curran's case sufficiently stated a cause of action under the Unruh Act, and thus the case was allowed to proceed. *Id.* at 734. At trial, the court determined that BSA was subject to the Unruh Act, but that application of Unruh to BSA would infringe on BSA's First Amendment freedom of association. *Id.* Curran's case was ultimately decided in 1998, when the California Supreme Court held that BSA was not subject to the Unruh Act as a place of public accommodation. *Curran*, 952 P.2d at 219.

[167] *Dale II*, 734 A.2d at 1205.

[168] *Id.* Dale's second notice was dated October 16, 1990. *Id.*

[169] *Id.* This letter was sent on Nov. 27, 1990, by Charles Ball, the Assistant Regional Director of the Northeast Region. *Id.*

[170] *Id.* Dale's request was sent to the Chief Scout Executive of BSA, three weeks after receiving Mr. Ball's Nov. 27 letter. *Id.*

[171] *Id.* at 1205.

accommodation law, the LAD.[172] In relevant part, the LAD provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of *any place of public accommodation*, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, *affectional or sexual orientation*, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.[173]

### A. *The Lower Court Decisions*

The battle was first engaged in the chancery division of the New Jersey courts, where Dale and BSA filed cross motions for summary judgment. The court denied Dale's motion, but granted BSA's,[174] finding that BSA had always maintained a policy of excluding "active homosexual[s]" and that it was "unthinkable . . . that the BSA could or would tolerate active homosexuality if discovered in any of its members."[175] The court then found that BSA was not a place of public accommodation, as BSA was exempt under the LAD's "distinctly private" exception.[176]

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[172] *Id.* Dale also alleged a common law cause of action. Because this article focuses exclusively on the nature of public accommodation laws and their interaction with First Amendment protections, the common law claim will not be discussed.

[173] N.J. STAT. ANN. § 10:5-4 (West 1999).

[174] Dale v. Boy Scouts of America, No. MON-C-330-92 (N.J. Ch. Nov. 3, 1995).

[175] *Id.* at 40. "The court opined that homosexual acts are immoral and attributed to Boy Scouts a longstanding antipathy toward such behavior." *Dale II*, 734 A.2d at 1206 (citing to the chancery division holding).

[176] *Dale II*, 734 A.2d at 1206; *see also* N.J. STAT. ANN. § 10:5-5(l) (West 1999). "Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." *Id.*

The New Jersey Appellate Division reversed.[177] In addition to holding that BSA was a public accommodation under the LAD and not exempt as a "distinctly private organization,"[178] the court found that BSA's First Amendment rights were not infringed upon substantially enough to justify the "invidious discrimination" of excluding gay scouts.[179] The appellate court focused on the relationship between BSA's "expressive purpose" and the exclusion of gay scouts.[180] The court found that BSA's purpose – "to instill in the scouts those qualities of leadership, courage and integrity to which the BSA has traditionally adhered" – was not compromised in "any significant way"[181] by allowing the membership of openly gay scouts.[182] The court noted that nothing in the BSA

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[177] Dale v. Boy Scouts of America, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) ("*Dale III*").

[178] *Id.* at 283 ("[W]e reject summarily the trial judge's conclusion that defendants qualified for the LAD exclusion . . . for any 'institution which is in its nature distinctly private.'").

[179] *Id.* at 288. "As applied to the facts before us, it cannot convincingly be argued that the LAD's proscription against discrimination based on 'affectional or sexual orientation' impedes the BSA's ability to express its collective views on scouting." *Id.*

[180] *Id.* at 288-90. "[I]t is undisputed that [an anti-gay] policy has not been incorporated into BSA's bylaws, rules, regulations and handbooks. It was not contained in plaintiff's application for the adult scoutmaster position." *Id.* at 290.

[181] *Id.* "We conclude that enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in 'any significant way' BSA's ability to express [its] views and to carry out [its] activities." *Id.* at 288.

[182] *Id.* It is interesting to note that, in its arguments before the appellate division, BSA drew a distinction between Dale's participation before he publicly acknowledged his homosexuality, and after. BSA's argument was that, upon this public declaration, Dale undertook an "expressive activity," arguably to bring the facts in this case more in line with *Hurley*. *Id.* at 292. Apparently, BSA has no problem with the active participation of closeted gay scouts. The irony of this did not go unnoticed by the appellate division: "In [the court's] view, there is a patent inconsistency in the notion that a gay scout leader who keeps his 'secret' hidden may remain in scouting and one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled." *Id.* at 293. *See generally* Nan D. Hunter, *Identity, Speech, and Equality,* 79 VA. L. REV. 1695, 1696 (1993) (analyzing the development of the legal recognition of speech associated with homosexuality, and pointing out that

"bylaws, rules, regulations and handbooks" indicated that its expressive purpose was to exclude gay scouts.[183]

Finally, the court distinguished *Hurley* by interpreting that decision as dealing exclusively with "a form of pure speech."[184] The court explained:

> Unlike a parade . . . the BSA is a national organization focusing its energy and resources on activities aimed at the physical, moral and spiritual development of boys and young men. [The LAD] simply demands access to those activities; it does not attempt . . . to hamper BSA's ability to carry out these activities or express its views respecting their beliefs.[185]

Further, the court recognized the distinction between Dale's desire to *join* an organization, and GLIB's desire to *speak* – essentially, to communicate the message that it was a gay Irish group.[186]

### *B. The New Jersey Supreme Court: Rejecting Discrimination*

The New Jersey Supreme Court unanimously upheld the appellate division's decision.[187] The court first considered wheth-

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"[t]o be openly gay, when the closet is an option, is to function as an advocate as well as a symbol").

[183] *Dale III*, 706 A.2d at 290-91. The court noted that two "position statements" that BSA had relied upon as evidence that admitting gays was violative of its expressive purpose were not adequately indicative of BSA's true expressive purpose. "We cannot accept the proposition that [these] 'Position Statement[s],' issued for the first time seventy-six years after Congress granted the BSA its Charter, represents a collective 'expression' of ideals and beliefs that brought the boy scouts together," especially since they were issued at "a time when [BSA's] anti-gay policy was subject to judicial challenge in California." *Id. See also supra* note 166 (detailing the "judicial challenge in California").

[184] *Dale III*, 706 A.2d at 292-93.

[185] *Id.* at 293.

[186] *Id.* Notably, the court acknowledged the nature of the distinction: "His public acknowledgment that he is a homosexual is hardly comparable to a banner in a parade declaring his pride in his homosexuality." *Id.*

[187] Dale v. Boy Scouts of America, 734 A.2d 1196, 1230 (N.J. 1999) ("*Dale II*").

er BSA qualified as a public accommodation.[188] After analyzing statutory interpretations of both "place" and "public accommodation," the court ultimately held BSA appropriately was subject to the LAD as a place of public accommodation.[189] Further, the court determined that BSA's claim that it should be exempt from the LAD under the "distinctly private" exception was invalid.[190] Accordingly, the court held that BSA's action of revoking Dale's membership was in violation of the LAD: "It necessarily follows that [BSA] violated the LAD when it expelled [James Dale]."[191]

The court then faced the task of addressing BSA's First Amendment claims.[192] Given the size of BSA, the intimate association prong of the freedom of association was a fairly easy assessment. "As applied to the Boy Scouts, we find that its large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association."[193]

The court began its expressive association analysis by stating plainly that the "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral,"

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[188] *Id.* at 1208. Because the goal of the LAD was "the eradication 'of the cancer of discrimination,'" *Fuchilla v. Layman*, 537 A.2d 652 (1988) (quoting Jackson v. Concord Co., 253 A.2d 793 (1969)), the court recognized that the LAD should be "interpreted . . . 'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Dale II*, 734 A.2d at 1208 (quoting Andersen v. Exxon Co., 446 A.2d 486 (1982)).

[189] *Dale II*, 734 A.2d at 1207-13.

[190] *Id.* at 1218. BSA also urged for exceptions under the "religious educational facility" and "in loco parentis" exceptions. *Id.* at 1213. The court disagreed with both rationales. *Id.* at 1218.

[191] *Id.* at 1219. "It is undeniable that Dale lost those 'privileges' and 'advantages' [of BSA membership] when he was expelled." *Id.* at 1218.

[192] *Id.* at 1219-29.

[193] *Id.* at 1221. The court expressly held that this was true, regardless of whether BSA argued as a national organization, or at the individual troop level. *Id.* "[C]ontrary to Boy Scouts' assertion, whether we evaluate the Boy Scout organization at the national or local troop level, the result would be the same." *Id.*

and thus, enforcement of the LAD "does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views."[194] In fact, the court acknowledged, BSA discourages its leaders from expressing any views on sexual issues.[195]

The court acknowledged BSA's argument that the Scout Law and Oath are evident of its views on homosexuality.[196] BSA had argued that the language in these organizational mantras implied a moral disapproval of homosexuality.[197] In particular, BSA relied on the text of the "Clean" provision of the Scout Law[198] and the

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[194] *Id.* at 1223. "Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." *Id.*

[195] *Dale II*, 734 A.2d at 1223.

[196] *Id.*

[197] *Id.* at 1224; *see also* Brief for Respondent at 32, Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) (No. A-2427-95T3) (arguing that "a Scout leader who was an avowed homosexual would interfere with normative message that homosexual conduct is inconsistent with the Scout Oath and Law").

[198] The full text of the Scout Law reads as follows: "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." HANDBOOK, *supra* note 156, at 47. The *Handbook* also offers detailed explanations of each term:

> *A Scout is trustworthy.* A Scout tells the truth. He is honest, and he keeps his promises. People can depend on him. . . .
> *A Scout is loyal.* A Scout is true to his family, friends, Scout leaders, school, and nation. . . .
> *A Scout is helpful.* A Scout cares about other people. He willingly volunteers to help others without expecting payment or reward. . . .
> *A Scout is friendly.* A Scout is a friend to all. He is a brother to other Scouts. He offers his friendship to people of all races and nations, and respects them even if their beliefs and customs are different from his own. . . .
> *A Scout is courteous.* A Scout is polite to everyone regardless of age or position. He knows that using good manners makes it easier for people to get along. . . .
> *A Scout is kind.* A Scout knows there is strength in being gentle. He treats others as he wants to be treated. Without good reason, he does not harm or kill any living thing. . . .
> *A Scout is obedient.* A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he

"morally straight" reference in the Scout Oath[199] as indicative of this condemnation of homosexuality. The court was clear in rejecting these attempts at justifying Dale's exclusion: "The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral."[200] Without more, the court found that it was impossible to determine how Dale's inclusion could infringe "in any significant way" on BSA's ability to carry out its various

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> thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobeying them. . . .
>
> *A Scout is cheerful.* A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy. . . .
>
> *A Scout is thrifty.* A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property. . . .
>
> *A Scout is brave.* A Scout can face danger although he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him. . . .
>
> *A Scout is clean.* A Scout keeps his body and mind fit. He chooses the company of those who live by high standards. He helps keep his home and community clean. . . .
>
> *A Scout is reverent.* A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

HANDBOOK, *supra* note 156, at 47-54 (listing these provisions, and providing even more detailed explication of each concept).

[199] The full text of the Scout Oath reads as follows: "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." HANDBOOK, *supra* note 156, at 9. The *Handbook* also describes the meaning of the Scout Oath, advising scouts, "Before you pledge yourself to any oath or promise, you must know what it means." HANDBOOK, *supra* note 156, at 45. Under the phrase, "and morally straight," the *Handbook* provides the following:

> To be a person of strong character, your relationships with others should be honest and open. You should respect and defend the rights of all people. Be clean in your speech and actions, and remain faithful in your religious beliefs. The values you practice as a Scout will help you shape a life of virtue and self-reliance.

HANDBOOK, *supra* note 156, at 46.

[200] *Dale II*, 734 A.2d at 1224.

purposes.[201] Thus, Dale's exclusion was "based on assumptions in respect of status" that are irrelevant to BSA's shared expressive purpose.[202] This type of exclusion, according to the court, was rejected in *Roberts* and *Rotary*, and thus BSA's exclusion of Dale was found to violate the LAD.[203]

Like the appellate division, the supreme court addressed BSA's reliance on *Hurley*, this time in a sub-section entitled "Freedom of Speech."[204] Further, as the appellate division had, the court swiftly rejected BSA's reliance: "We find the facts of *Hurley* distinguishable. Dale's status as a scout leader is not equivalent to a group marching in a parade."[205] Analyzing the facts as if it were a free speech case, the court still determined that the factual distinguishability from *Hurley* to *Dale* was sufficient to find BSA's exclusion improper: "We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality."[206]

The court ultimately held that New Jersey's compelling interest to eliminate discrimination overcame BSA's claimed First Amend-

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[201] *Id.* at 1225 (citing Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)). "That Boy Scout members do not associate to share the view that homosexuality is immoral suggests that Dale's expulsion constituted discrimination based on his status as an openly gay man." *Id.*

[202] *Id.*

[203] *Id.* The court then went on to describe the way in which Dale's exclusion was an example of the very kind of discrimination the Supreme Court had rejected in *Roberts*. "The invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." *Id.* at 1226.

[204] *Id.* at 1228-29.

[205] *Id.* at 1229. The court further stated: "Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies." *Id.* The court then analogized this to *Curran v. Mount Diablo Council of the Boy Scouts of America*, where the plaintiff had actively declared that he would use his membership "in order to promote" his views about homosexuality. *Id.* (citing Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 215, 253 (Cal. 1998) (Kennard, J., concurring)).

[206] *Dale II*, 734 A.2d at 1229.

ment violation.[207] It acknowledged the unique place that BSA holds as an "American institution committed to bringing a diverse group of young boys and men together . . . to play and learn."[208] In the final analysis, however, nothing BSA presented "suggest[ed to the court] that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral."[209] Thus, BSA's First Amendment claim was rejected.[210]

### C. *A Bare Majority of the United States Supreme Court Rejects Anti-Discrimination, Ignores Precedent*

The United States Supreme Court, in a 5-4 decision, reversed the New Jersey Supreme Court.[211] The majority decision was

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[207] *Id.* at 1228. The court described the nature of New Jersey's extensive history in rejecting discrimination, noting that the LAD was enacted twenty years before Title VII, the federal public accommodation statute. *Id.* at 1227. "Like other similar statutes, the LAD serves a compelling state interest and 'abridges no more speech or associational freedom than is necessary to accomplish that purpose.'" *Id.* at 1228 (quoting *Roberts*, 468 U.S. at 629).

[208] *Id.* at 1228.

[209] *Id.*

[210] *Id.* at 1230. Judge Handler provided an extensive concurrence, where he reiterated many of the same points from the majority opinion, although advocating even more strongly that BSA's attempts to exclude Dale were improper. *See id.* at 1230-45 (Handler, J., concurring).

> I fully endorse the Court's reasoning in reaching [its] result. . . . This case . . . pits an individual's right to be protected under the LAD from discrimination based on his sexual orientation against the First Amendment expressional rights of a public accommodation. In resolving that conflict, we must consider the significance of the connection between the individual's speech and his identity when both relate to his sexual orientation.

*Id.* Judge Handler then went on to argue passionately for the end to discrimination against gays and lesbians. "Stereotypes cannot be invoked to extend the meaning of self-identifying expression of one's own sexual orientation, and thereby become a vehicle for discrimination against homosexuals." *Id.* at 1245.

[211] Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2449 (2000). The Court split along traditional conservative-liberal lines, with Justices O'Connor, Scalia, Kennedy and Thomas joining Chief Justice Rehnquist's majority decision. *Id.* There was much speculation about how the Court would resolve the case when it was argued. Many predicted the eventual outcome, speculating that ideological

terse, and contained many logical leaps that resolved few of the questions raised by *Hurley*.[212] Still, the Court made clear that, precedent aside, it would not be the institutional body responsible for telling the Boy Scouts that it could not reject an "avowed homosexual" and "gay activist."[213]

After detailing the procedural history of the case, the Court began its discussion of the law by recounting *Roberts*.[214] In its articulation of the parameters of the right to exclude, however, the Court left out a key aspect of the law as set out in *Roberts* and injected something new.[215] The *Roberts* Court stated the relevant law as: "a regulation that forces the group to accept members it does not desire . . . may impair the ability of the original members to express only those views *that brought them together*."[216] The *Dale* Court, on the other hand, stated: "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, *that it intends to express*."[217]

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predispositions would dictate the decision. *See* Tony Mauro, *Justices Poised to Overturn Ruling that Forced Scouts to Admit Gays*, N.J. L.J., May 1, 2000, at 4; *Gay Rights, Boy Scouts*, WASH. POST, Apr. 28, 2000, at A30. Still, when the case was argued on April 26, 2000, the lively questioning on both sides of the ideologic divide left many wondering at the possibility of a different outcome. *See* Roger K. Lowe, *Scout Case Perplexes High Court*, COL. DISPATCH, Apr. 30, 2000, at C3; Deb Price, *Will Justices' Scrutiny Help Gay Scouts?*, DETROIT NEWS, May 1, 2000, at 11; Rocco Cammarere, *Court Twists Over Scouts' Knot on Gays*, N.J. LAW., May 1, 2000, at 1; Editorial, *Trustworthy, Loyal, Helpful – and Gay?*, WASH. TIMES, Apr. 28, 2000, at A22; *see also* Oral Argument, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).

[212] *See, e.g.*, Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 12 ("The text is fairly terse . . . That terseness produces both an easy road map to the Court's logic, and elisions and logical lapses at critical points."); *see also* Andrea R. Scott, Casenote, *State Public Accommodation Laws, the Freedom of Expressive Association, and the Inadequacy of the Balancing Test Utilized in* Boy Scouts of America v. Dale, 120 S. Ct. 2446, 24 HAMLINE L. REV. 131, 159 (2000) (noting that, because of the Court's analysis of *Hurley*, "[t]he *Dale* Court has blurred the distinction between free speech and expressive association" law).

[213] *Dale*, 120 S. Ct. at 2449.

[214] *Id.* at 2451.

[215] *See supra* Part I.C.1 (detailing *Roberts*).

[216] *Roberts*, 468 U.S. at 623 (emphasis added).

[217] *Dale*, 120 S. Ct. at 2451 (emphasis added).

The *Dale* Court articulated the law in a fundamentally different way than the *Roberts* Court had. It changed the emphasis from that aspect of the association *that brought the group together*, to that aspect of association about which *the group intends to express*. Nowhere, however, does the Court connect this newly formed articulation of association law with the principles underlying the constitutional right.

After recognizing that BSA is, in fact, an organization with an expressive purpose,[218] the Court looked to what extent Dale's inclusion would "significantly affect" BSA's "ability to *advocate public or private viewpoints*."[219] Here again, the Court changed the law. The *Roberts* Court had posed the question, does the forced inclusion "impose[] any serious burdens on the [organization's] *freedom of expressive association*"?[220] The *Roberts* analysis focused on the extent to which an organization's expressive association is burdened because that furthers the underlying principle behind freedom of association law – that the First Amendment should protect the expressive element "that brought them together."[221] The *Dale* Court's focus on the notion of "advocating viewpoints" repositioned the law of freedom of association as outlined in *Roberts*. In essence, the Court *Hurley*-ized the *Roberts* trilogy.

The Court then determined that the New Jersey Supreme Court was wrong first to review BSA's expressive purpose by looking at the record objectively, and then to consider the burden on BSA by Dale's forced inclusion.[222] "[O]ur cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[223] Instead, the Court noted that it was appropriate to "accept the Boy Scouts' assertion" that they do not want "to

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[218] *Dale*, 120 S. Ct. at 2451-52.
[219] *Id.* at 2452 (emphasis added).
[220] *Roberts*, 468 U.S. at 626 (emphasis added).
[221] *Id.* at 623.
[222] *Dale*, 120 S. Ct. at 2452.
[223] *Id.*

promote homosexual conduct as a legitimate form of behavior."[224] In fact, the Court took the stridency with which BSA had maintained its opposition to homosexuality in various court battles as evidence of its true position.[225]

The Court's next move was another serious detour from the *Roberts* doctrine, and likely changed its future effects. Where the *Roberts* Court looked intently at the extent to which the forced inclusion would create "serious burdens" on the Jaycees' rights of expressive association,[226] the *Dale* Court chose instead to "give deference to an association's view of what would impair its expression."[227] This change in posture resulted in the Court accepting BSA's reliance on *Hurley* as to how Dale's presence would "impair its message."[228]

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[224] *Id.* at 2453. "We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality." *Id.* On this point, the Court did not veer from the *Roberts* analysis, as the *Roberts* Court did not need to assess whether or not the Jaycees did in fact disapprove of women as members. Thus, it is a new part of the equation that an organization can profess the scope of its expressive purpose. What this analysis ignores, however, is the essence of *Roberts*. *See supra* Part I.C (analyzing how the *Roberts* trilogy stands for the rejection of "invidious discrimination").

[225] *Dale*, 120 S. Ct. at 2453 ("We cannot doubt that the Boy Scouts sincerely holds this view.").

[226] *Roberts*, 468 U.S. at 626.

[227] *Dale*, 120 S. Ct. at 2453. As support for this bold new reading of a court's obligation after *Roberts*, the *Dale* majority cited to *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). *La Follette* involved the selection of delegates for a state Democratic Party. That Court determined that it could not interject its own reasoning into the process used to select delegates. *Id.* The case predated *Roberts*; in fact, the *Roberts* Court cited to *La Follette* in a "Cf." citation, apparently believing its principles suupported the method of analysis undertaken in Roberts. *Roberts*, 468 U.S. at 627. Certainly, *La Follette* does not stand for giving total deference to a litigant over the very core of the issue before the Court. Nonetheless, the *Dale* majority's reliance on *La Follette* "re-characterizes" its holding as now justifying a type of Court deference completely at odds with the essence of the *Roberts* decision.

[228] *Dale*, 120 S. Ct. at 2454. "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* The Court then quoted extensively from *Hurley*, describing how the imposition of GLIB's message into the parade would "force"

The Court then reinterpreted First Amendment law to justify this misinterpretation of and reliance on *Hurley*, asserting a new definition of the right of expressive association. "First, associations do not associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."[229] Discussing *Hurley*, the Court claimed that the parade organizers did not need to assert something about sexual orientation in order to receive First Amendment protection.[230] In making this assertion, however, the Court failed to recognize the distinction between the nature of the speech protected in *Hurley* and the expressive association issue at stake in *Dale*.[231]

The Court next reiterated its assertion that BSA's "sincerity of belief" was sufficient for it to extend First Amendment protection, despite New Jersey's compelling interest to the contrary.[232] Further, the Court held that it did not matter that there were varying opinions within BSA on the issue of homosexuality. Because BSA takes an "official position with respect to homosexual conduct," the fact that some in the organization disagree was irrelevant.[233]

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GLIB's message onto the parade organizers, therein violating the First Amendment. *Id.* Then, to complete its conflation of *Hurley's* quote about parades and banners, the Court explained:

> 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 Scout's choice not to propound a point of view contrary to its beliefs.

*Id.*

[229] *Id.* at 2454.

[230] *Id.*

[231] *See infra* Part III.A (discussing how the *Dale* majority conflated status and viewpoint).

[232] *Dale*, 120 S. Ct. at 2454-55.

[233] *Id.* at 2455. "The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Id.* This section of the Court's argument, of course, depends on the conflation caused by the introduction of the *Hurley* analogy. The continuous references to "homosexual behavior" and the fact that Dale was an "avowed homosexual" and "gay rights

The majority then faulted New Jersey's public accommodation law, and the New Jersey Supreme Court's application thereof. While the Court was constrained to accept New Jersey's expansive interpretation of the statute, it noted that "the New Jersey Supreme Court went a step further and applied its public accommodations laws to a private entity without even attempting to tie the term 'place' to a physical location."[234] Finally, the Court concluded that requiring BSA to retain Dale "would significantly burden the organization's right to oppose or disfavor homosexual conduct."[235] Thus, the Court rejected Dale's claim, and affirmed BSA's right to discriminate against gay men.[236]

There were two dissents; the principle one, authored by Justice Stevens,[237] took a very similar approach to that taken by the New Jersey Supreme Court. Justice Stevens first expressed dismay that the majority relied so heavily on BSA's "official statements" to justify its belief that the organization was opposed to "homosexuality."[238] The dissent also lamented the fact that the majority's

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activist" are evidence that the Court did not want to address the more difficult issue – whether Dale's status as a gay man, in and of itself, was the equivalent of GLIB's banner, causing Dale's mere presence to impart onto BSA a message that "being gay" is moral. *See infra* Part III.A.

[234] *Dale*, 120 S. Ct. at 2456. In fact, the Court noted in a footnote, the New Jersey court was the only state supreme court in the country to interpret a public accommodation law so broadly. *Id.* at n.3.

[235] *Dale*, 120 S. Ct. at 2457.

[236] *Id.* "That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law." *Id.*

[237] *Id.* at 2459. Justices Souter, Ginsburg and Breyer joined Justice Stevens' dissent. *Id.* at 2449.

[238] *Dale*, 120 S. Ct. at 2459 (Stevens, J., dissenting). Justice Stevens noted that the policies were insufficient to justify Dale's exclusion. "[S]imply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim." *Id.* at 2463. The policy, furthermore, "was never publicly expressed." *Id.* Additionally, the first known policy statement, from 1978, was equivocal at best, because it stated that a person who "openly declares himself to be a homosexual" could not be a scoutmaster "in the absence of any law to the contrary." *Id.* Since the LAD was a law "to the contrary," Justice Stevens argued, it was not unequivocal that the statement would still support Dale's exclusion. *Id.* Finally, Justice Stevens noted that the policy only expressed that

handling of the *Dale* facts rejected First Amendment precedent.[239] "[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."[240] After recounting the history of the *Roberts* trilogy, Justice Stevens summed up:

> Several principles are made perfectly clear by Jaycees and Rotary Club. First, to prevail on a claim of expressive association in the face of a State's antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity. Both the Jaycees and the Rotary Club engaged in expressive activity protected by the First Amendment, yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the Jaycees and the Rotary Club did that as well. Third, it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy.[241]

Justice Stevens was most concerned about the impact of the majority's analysis on future precedent, and about the way the majority altered the scope of freedom of association 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."[242]

Justice Stevens' dissent ended by lamenting the unfair stereotyping of gays and lesbians, and the way those "atavistic opinions" die out through "interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes."[243]

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homosexuality was "not 'appropriate.'" *Id.*

[239] *Id.* at 2466.

[240] *Id.* at 2467. "To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy." *Id.*

[241] *Id.* at 2468-69 (emphasis in original). "The majority pretermits this entire analysis." *Id.* at 2470.

[242] *Id.* at 2471.

[243] *Id.* at 2477-78. Justice Souter added a short dissent, joined by Justices Ginsburg and Breyer. *Id.* at 2478-79 (Souter, J., dissenting). Although agreeing

## III. THE CONSTITUTIONAL RIGHT TO EXCLUDE GAY MEN

The nature of the disagreement between the *Dale* Court's majority and dissent lies in the conceptualization of the constitutional right in question: the majority saw the issue as one about speech, and thus credited the illustration provided by *Hurley*, and its hallowed assertion that speech forced on someone is a violation of the right not to speak.[244] Few would reject that; few endorse the idea that it is all right for a government to require an organization to say something with which it disagrees. But, as the dissent articulated in its conceptualization of the right at issue, this ignores the history and essence of the freedom of association jurisprudence, dating back to *NAACP v. Alabama*,[245] and through its classic articulation in the *Roberts* trilogy.[246] At the core of these cases is the kernel of truth so obviously ignored by the majority: that a group can only rely on the First Amendment's protection *to the extent that* the message in jeopardy is at the core of the group's expressive purpose.[247] In failing to deny BSA its right to hide its invidious discrimination behind the First Amendment, the *Dale* majority created the constitutional right to exclude gay men.[248]

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with all of Justice Stevens' dissent, Justice Souter wanted to make clear that the change in society's perceptions about gays and lesbians were relevant, but not a requirement for the dissent's assessment of the decision. *Id.* Rather, Justice Souter argued that it was essential that BSA's "failure to make sexual orientation the subject of any unequivocal advocacy" that required his decision that they should not be afforded First Amendment protection. *Id.* at 2479. "To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law." *Id.*

[244] *Dale*, 120 S. Ct. at 2454. "*Hurley* is illustrative on this point." *Id.*

[245] 357 U.S. 449 (1958).

[246] *See NY Clubs*, 487 U.S. at 1; *Rotary*, 481 U.S. at 537; *Roberts*, 468 U.S. at 609; *see also supra*, Part I.C (documenting the history of the United States Supreme Court's development of the freedom of association).

[247] *See infra* Part III.B.1 (articulating the rationale behind the First Amendment freedom of association).

[248] *See Dale*, 120 S. Ct. at 2478 (Stevens, J., dissenting); *see also* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 24 ("[T]he result is that

The *Dale* majority's failure is twofold. First, the Court accepted BSA's argument that *Hurley* was applicable on the question of whether Dale's inclusion would necessarily require BSA to take on the viewpoint that homosexual conduct is not immoral.[249] Moreover, the *Dale* Court simply misapplied precedent – ignoring the very limited nature of the freedom of association, and denying the applicability of the discrimination rejected in the *Roberts* trilogy.[250]

### A. *Even Crediting the Majority's Invocation of* Hurley, Dale *Still Got It Wrong*

*Hurley*'s unique procedural history went a long way toward confusing the freedom of association jurisprudence.[251] It did deal with a public accommodation statute,[252] however, and the plaintiffs did raise a freedom of expressive association argument;[253]

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socially visible homosexuality creates a basis for exclusion to an extent that no other minority characteristic does."). The right to exclude gay men and lesbians already exists in another context, actually: the military's "don't ask, don't tell" policy was deemed constitutional. *See, e.g.*, Able v. United States, 155 F.3d 628, 636 (2d Cir. 1998) (holding that the military's "don't ask, don't tell" policy "does not violate the Equal Protection Clause of the United States Constitution"). The *Dale* decision, on the other hand, deals specifically with gay men, as BSA is a male-only organization, and thus the exclusion relates only to gay men. Arguably, its principles would apply if an all-women's organization sought to exclude lesbians from its membership. Professor Hunter notes, however, that the majority's analysis "invokes another canard: the intrinsic uncontrollability of gay male sexuality." Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 22. It is conceivable that an effort to exclude a lesbian would result in a different outcome, because the spectre of "gay male sexuality" would presumably not apply to lesbians.

[249] *See infra* Part III.A.

[250] *See infra* Part III.B.

[251] *See supra* Part I.C.4 (discussing the fact that *Hurley* was originally analyzed under a freedom of expressive association claim, but ultimately decided by the Supreme Court using a freedom of speech analysis).

[252] *Hurley*, 515 U.S. at 561 (citing section 272:98 of the Massachusetts General Laws, the state's public accommodation statute).

[253] *Id.* at 563 (noting that the trial court rejected the defendants' claims that the forced inclusion of GLIB would negatively implicate their associational rights).

thus, its place in this area of law is not without some rationale. Ultimately, though, the United States Supreme Court decided the case on pure speech grounds.[254] What the *Dale* majority does by invoking *Hurley* within the context of *Dale*'s freedom of association analysis is fail to clarify this confusion.[255] Instead, the Court used aspects of the *Hurley* analysis to change the *Roberts* trilogy's effect. First, it discredited the specificity of *Hurley*'s holding – which was about the unique nature of parades and banners.[256] In the process, the Court muddied First Amendment jurisprudence separating free speech and freedom of expressive association analyses.[257] Finally, in the process of transposing onto James Dale the essence of "sending a message," the *Dale* majority conflated status and speech,[258] evidencing the Court's ignorance

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[254] *Id.* at 581 ("Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech."); *see also Dale II*, 734 A.2d at 1229 (arguing that the *Dale* facts are distinguishable from *Hurley*'s because that case was decided on freedom of speech grounds).

[255] *Dale*, 120 S. Ct. at 2454. This invocation immediately followed Chief Justice Rehnquist's application of a traditionally free speech-type analysis: "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.*

[256] *Hurley*, 515 U.S. at 568-70 (detailing the expressive nature of a parade as a threshold analysis in determining whether the parade organizers were justified in rejecting certain members from participating in the parade); *see also Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting) ("Our conclusion [in *Hurley*] that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march.").

[257] *See Dale*, 120 S. Ct. at 2472 (Stevens, J., dissenting) ("Though the majority mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim.").

[258] *Id.* at 2476 ("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."). Remarkably, Judge Nolan's dissent in *Hurley* by the SJC, which first made the free speech argument in the *Hurley* case, did not mistake this principle. *See Hurley*, 515 U.S. at 565 ("In Justice Nolan's opinion, because GLIB's message was separable from the status of its members . . . a narrower order [allowing individuals to march without a banner] would accommodate the State's interest

to emerging conceptions of gay and lesbian identity, and sexuality in general.[259]

### *1.* Hurley *Was About Parades and Banners*

Justice Souter's first words in *Hurley* broadcast the intent of the ultimate holding: "The issue in this case is whether Massachusetts may require private citizens who organize *a parade* to include among the *marchers* a group imparting a message the organizers do not wish to convey."[260] The Court took great pains to define the nature of a parade, to establish its expressive elements, and to explain why the case was so obvious to the unanimous Court.[261] The Court drew parallels from free speech jurisprudence to firmly root the decision among that line of cases.[262] It made all of this

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without likelihood of infringing on the Council's First Amendment Rights."); *see also infra* Part III.A.2.

[259] *See* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 4-5 (2000) (discussing coming out speech for gays and lesbians as a form of "expressive identity").

> Expressive identity is a product of identity politics, an outgrowth of a series of equality claims. These claims are made, often by and through law, not on behalf of a voluntarist group that expresses an ideology, but on behalf of a group defined by an identity which is itself expressive. A new equality discourse has shifted from understanding race and other characteristics as simply inborn fortuities to seeing them as socialized meanings of communities and groups. The law has played a central, fundamental role in shaping the new meanings of identity.

*Id.*

[260] *Hurley*, 515 U.S. at 559 (emphasis added).

[261] *See id.* at 569 ("Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them."). Since parades are a form of speech, the Court held, using a state public accommodation law to force GLIB's participation "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

[262] *Id.* at 569.

> Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. . . . [and] the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion

clear so that its decision could be understood to reject the lower courts' freedom of association analyses, and explicitly establish that "a speaker has the autonomy to choose the content of his own message."[263] Thus, *Hurley* can and should be read narrowly as interpreting free speech rights, specifically in the context of a parade.[264]

An especially important fact about *Hurley* was that the parade organizers claimed that they did not find it objectionable to allow individual gay marchers into the parade; rather, they claimed that the marchers walking behind a banner, proclaiming their homosexuality, was objectionable.[265] The organizers "disclaim[ed] any intent to exclude homosexuals as such, and no individual member of GLIB claim[ed] to have been excluded from parading as a member of any group that the Council [had] approved to march."[266] It was of no concern that they alone, as gay people, would send any "articulable message" that would be projected onto the parade organizers.[267] What was of concern was that GLIB, marching as a group and carrying a banner, would communicate a message that the *Hurley* Court found to be a violation of the

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> pages, which, of course, fall squarely within the core of First Amendment security.

*Id.* at 570 (citations omitted). The Court even made references to the protection of works of art which are without question forms of speech protected by the First Amendment. "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569 (citations omitted). *See also supra* Part I.C.4 (discussing the Court's holding and rationale in *Hurley*).

[263] *Hurley*, 515 U.S. at 573.

[264] *See Dale*, 120 S. Ct. at 2474-76 (Stevens, J., dissenting) (discussing how *Hurley*'s holding was specific to the fact that it was about parades, and that it interpreted the right of free speech, not freedom of association).

[265] *Hurley*, 515 U.S. at 572.

[266] *Id.*

[267] *See Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting) ("Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so.").

organizers' freedom of speech; a violation of their right to not say something.[268] It is clear from the facts and holding of *Hurley* that gay individuals do not, in their status as gay individuals, sufficiently proclaim anything in violation of *Hurley*'s mandate.[269]

The *Dale* majority plainly missed this distinction. Instead, without further explanation, the Court, juxtaposing its argument with *Hurley*,[270] 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 Scout's choice not to propound a point of view contrary to its beliefs.[271]

The majority ignored the factual distinction in *Hurley*, and imported the essence of its principles into *Dale*, without reason or explanation.[272]

To understand what would truly be comparable, consider a fact pattern in a Boy Scout scenario that might have been similar, therein justifying Chief Justice Rehnquist's elision. Suppose James Dale proposed the formation of a BSA chapter, and sought official recognition from the National Committee. This scenario would

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[268] *Hurley*, 515 U.S. at 573 ("Indeed [the] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

[269] *Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting) ("Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world.").

[270] Bizarrely, the Court even referenced the point that the parade organizers were concerned not with the individual gay people marching, but rather the group marching behind a banner. *Dale*, 120 S. Ct. at 2454. The Court then took the text from *Hurley* – "it boils down to the choice of a speaker not to propound a particular point of view" – and applied it not to the imposition created by the group and their banner, but on the individual, without explaining the rationale underlying this significant leap. *Id.* (quoting *Hurley*, 515 U.S. at 575).

[271] *Dale*, 120 S. Ct. at 2454.

[272] *Id.* at 2475 (Stevens, J., dissenting). "Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today." *Id.*

make *Hurley* factually comparable; this scenario alone creates the kind of problematic request that would justify *Hurley*'s applicability. If a court were faced with these facts, and the question presented was whether it was proper for a state law to require BSA *to recognize this group*, *Hurley*'s principles would be relevant. For in that case, and not in *Dale*, the state law would require BSA to officially recognize, and therein take on the message of, a group propounding "a point of view contrary to its beliefs."[273]

### 2. *Why Complicate the* Roberts *Test with a Free Speech-type Analysis?*

As the New Jersey Supreme Court stated clearly in response to BSA's argument that *Hurley* was dispositive, "[w]e find the facts of *Hurley* distinguishable."[274] *Hurley*'s analysis, however, incorporated both freedom of speech and freedom of association analyses, which created the opportunity for BSA to argue for its application in *Dale*. By refusing to state definitively that *Hurley*'s analysis is exclusive to free speech claims, the *Dale* Court unnecessarily interjected free speech-type analysis into the *Roberts* paradigm. Lower courts will be faced with a quandary: with facts similar to *Dale*, yet also similar to *Roberts*, which case should they follow? The quandary lies in the distinction between the two approaches.

In the freedom of speech context, when a party wants to limit the scope of its speech, it is very difficult for government to find any justification for forcing that private party to take on someone else's speech.[275] This is the essence of free speech, and the

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[273] *Hurley*, 515 U.S. at 575.

[274] *Dale II*, 734 A.2d at 1229. The court made this determination during its analysis under the heading, "Freedom of Speech." *Id.* at 1228.

[275] *See Hurley*, 515 U.S. at 573.

> Although the State may at times "prescribe what shall be orthodox in commercial advertising" . . . outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps,

correlative right not to speak; it is a First Amendment right distinct from a freedom of association claim.[276] The courts have determined that a newspaper[277] and a cable operator[278] engage in protected forms of speech, and each has the right to determine its own speech completely.[279] Likewise, they as entities have the freedom to say what they choose – the affirmative right of free speech.

In contrast, within the freedom of expressive association context, when a party seeks to exclude someone, the court must determine the organization's expressive purpose in order to determine whether the excluded member's presence would seriously burden that purpose.[280] The question at the heart of the analysis is not what speech will be forced on the organization for taking on a new member. The focus is on the extent to which the potentially excluded member's status would impinge on that group's ability to fulfill its expressive purpose.[281] In *Roberts*, the

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to the permissive law of defamation.

*Id.* (citations omitted).

[276] *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting) ("The standards governing [a free speech] claim are simply different from the standards that govern BSA's claim of a right of expressive association.").

[277] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[278] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[279] *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting) ("Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others.").

[280] *See Roberts*, 468 U.S. at 626-27 (analyzing the types of activities undertaken by the Jaycees to determine whether the organization's expressive purpose would be burdened by the inclusion of women); *see also Dale*, 120 S. Ct. at 2469 (Stevens, J., dissenting) ("[I]n Jaycees, we asked whether Minnesota's Human Rights Law requiring the admission of women 'impose[d] any *serious burdens*' on the group's 'collective effort on behalf of [its] *shared goals*.'") (quoting *Roberts*, 468 U.S. at 626-27) (emphasis in original).

[281] *See, e.g., Roberts*, 468 U.S. at 627 ("There is . . . 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."); *see also Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting) ("An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time."); *id.* at 2479 (Souter,

Court did not ask the question, "what speech will including women in the Jaycees force on the organization?". Rather, it asked to what extent the Jaycees' expressive purpose would be compromised by women's inclusion.[282] Thus, as Justice Stevens articulated in the *Dale* dissent, "a different kind of scrutiny must be given to an expressive association claim."[283] The essence of the right – safeguarding the freedom of the speech or viewpoint of the group – is protected. The constitutional right, however, does not become a shield behind which certain members of an organization's leadership can hide their "invidious discrimination."[284]

The First Amendment speech rights are relevant, obviously, but only to the extent that the organization's group activities/speech are implicated.[285] In *Hurley*, the parade organizers' freedom of association was not compromised; their freedom of speech was.[286]

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J., dissenting) ("I conclude that BSA has not made out an expressive association claim . . . not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message."); *see also* Part I.C.1-4 (detailing the development of the *Roberts* trilogy).

[282] *Roberts*, 468 U.S. at 627 (pointing out that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best").

[283] *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

[284] *Roberts*, 468 U.S. at 628 ("As we have explained, 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."). Justice Stevens underscored the rationale for this reasoning:

> [A] different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission of some person as a member or at odds with the appointment of a person to a leadership position in the group.

*Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

[285] *Dale*, 120 S. Ct. at 2469 (Stevens, J. dissenting).

[286] *Hurley*, 515 U.S. at 574 ("Petitioners' claim to the benefit of this principle of autonomy *to control one's own speech* is as sound as the South Boston parade is expressive.") (emphasis added).

Likewise, BSA's freedom of speech was not compromised by Dale.[287] BSA's true claim was whether its freedom of association was compromised.[288] Asking the question – "what speech is he forcing on us?" – is not the proper approach, then, to the constitutional question raised in a freedom of association case.[289]

### *3. The First Amendment Prohibits Forced Viewpoint/Speech – Not Status*

BSA's continued assertion throughout the *Dale* litigation that *Hurley* was controlling depended on the fact that Dale's forced membership required the organization to "propound" some speech or viewpoint.[290] Prior freedom of association caselaw did not use

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[287] *Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting) ("Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world.").

[288] In its brief to the Supreme Court, in fact, BSA argued that both its free speech and its free association rights were compromised. *See* Brief for Petitioner at i, *Dale*, 120 S. Ct. 2446 (No. 99-699). The question presented read: "Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association." *Id.*

[289] Arguably, even if that question were proper in the freedom of association cases, BSA should still lose. As the Court articulated in *Hurley*, one reason that GLIB's speech was imposed on the parade organizers in *Hurley* was because there was no opportunity for *Hurley* to disclaim its contents, given the unique nature of the parade. *Hurley*, 515 U.S. at 576-77 ("Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."). "A membership organization, by contrast, has multiple methods easily available for making its own views clear." Brief for the Society of American Law Teachers at 10, *Dale*, 120 S. Ct. 2446 (No. 99-699). Where an organization has the ability to "disclaim" the message, the Court has said, it will not be considered speech imposed on that establishment. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.").

[290] *See* Brief for Petitioner at 19, *Dale*, 120 S. Ct. 2446 (No. 99-699).

> [T]he New Jersey Supreme Court's decision that a Boy Scout Troop must appoint an open homosexual and gay rights activist as Assistant Scoutmaster violates Scouting's freedom of speech. An organization

the language of "viewpoints" "forced on" organizations; rather, it focused on whether the nature of the exclusion could be seen to impose any "serious burdens" on the group's ability to associate around that group's "shared goals."[291] When BSA's attorneys argued that *Hurley* was dispositive, they sought to convince the courts that the LAD's application to *Dale* would produce the same kind of "forced speech" that was at the heart of *Hurley*.[292] Unfortunately, they were successful.[293]

Public accommodation laws do not prohibit viewpoint discrimination – they prohibit discrimination on the basis of status.[294] The exact language of the statute at the heart of *Dale* reads:

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> cannot speak except through its agents. The adult Troop leader is the embodiment of the ideals of Boy Scouting. In light of the roles of uniformed adult leaders and their symbolic position in Scouting, to force Scouting to appoint persons who intend to be "open" and "honest" about their homosexuality . . . would violate the organization's right to control its own message and to avoid association with a message with which it does not agree. On this point, this case is controlled by the Court's recent, unanimous decision in *Hurley*.

*Id.* (citations ommitted).

[291] *See, e.g.*, *Roberts*, 468 U.S. at 626-27.

[292] *See* Brief for Petitioner at 23-24, *Dale*, 120 S. Ct. 2446 (No. 99-699).

> To the extent that there are any differences between this case and *Hurley*, this case presents an even stronger case for constitutional protection. . . . Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," putting Dale in an adult leader's uniform would interfere with Boy Scouting's ability to control the content of its message. Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.

*Id.* (citations omitted).

[293] *See Dale*, 120 S. Ct. at 2454 (discussing how *Hurley* is "illustrative" in understanding how Dale's membership would implicate BSA's message).

[294] *See* Brief for the Society of American Law Teachers at 8-9, *Dale*, 120 S. Ct. 2446 (No. 99-699) ("Indeed, this case would not be here had Dale been expelled for his views. The LAD does not prohibit the Boy Scouts from excluding persons for expressing points of view contrary to the Scouts' philosophy.").

> All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation.[295]

The law prohibits discrimination based on someone's *status* – not a viewpoint that individual's status signifies.[296] Other public accommodation laws are similar,[297] including those at issue in *Roberts*[298] and *Rotary*.[299] In each of those cases, the Court recognized that it was the *status* of women that precipitated their exclusion.[300] If the Court had undertaken the same analysis in *Roberts* as it did in *Dale* – and interjected the *Hurley* "viewpoint" analysis – it is likely it would have rejected the same idea: that women, by their status as females, inherently would project some message onto the Jaycees.[301]

The key to BSA's success was convincing the Court that there was something unique about an "avowed homosexual"[302] and

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[295] N.J. STAT. ANN. § 10:5-4 (West 1999).

[296] *See NY Clubs*, 487 U.S. at 13.

> If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.

*Id.*; *see also* Brief for the Society of American Law Teachers at 8-9, *Dale*, 120 S. Ct. 2446 (No. 99-699) (pointing out that the LAD "only prohibits [BSA] from excluding persons because of their 'race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation,' i.e., because of their status") (quoting from N.J. STAT. ANN. § 10:5-4).

[297] See *supra* Part I.A (detailing the history of public accommodation laws).

[298] MINN. STAT. ANN. § 363.03(3) (West 1999).

[299] CAL. CIV. CODE ANN. § 51 (West 2000).

[300] *Rotary*, 481 U.S. at 544; *Roberts*, 468 U.S. at 627.

[301] See *Roberts*, 468 U.S. at 627 ("[A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.").

[302] *Dale*, 120 S. Ct. at 2449; *see also* Brief for the Society of American Law Teachers at 9, *Dale*, 120 S. Ct. 2446 (No. 99-699) ("The Boy Scouts seek to

"gay rights activist."[303] The idea, BSA argued, was that a gay man's status was so imbued with elements of speech that the acknowledged participation of a gay man within scouting would raise the specter that BSA condoned homosexuality.[304] Nowhere in its supporting materials does BSA sufficiently show that James Dale ever intended to use his role as a scoutmaster to assert the idea that BSA's position on homosexuality was improper.[305] This is especially disingenuous because BSA itself asserts that scoutmasters are not supposed to speak about "sexuality,"[306] and Dale had a stellar record of obeying scouting doctrine.[307] BSA's reliance, then, was not on the facts of the specific case; it relied on – and convinced the United States Supreme Court to believe – the idea that gay men are "uncontrollable,"[308] and thus incapable of serving as scoutmasters without projecting this idea onto the organization as a whole.[309]

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collapse the line between status and speech by using the terms 'avowed homosexuals' or 'openly gay' persons.").

[303] *Dale*, 120 S. Ct. at 2449. BSA clearly succeeded. Chief Justice Rehnquist stated at the outset: "Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an *avowed homosexual* and *gay rights activist*." *Id.* (emphasis added).

[304] *See* Brief for Petitioner at 24, *Dale*, 120 S. Ct. 2446 (No. 99-699) ("Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.").

[305] Brief for the Society of American Law Teachers at 8, *Dale*, 120 S. Ct. 2446 (No. 99-699) ("The Boy Scouts had no basis other than a stereotypical presumption about gay men for believing that Dale would express any message contrary to the Boy Scouts' views . . . There is no basis in the record to believe that Dale would . . . advocate his own personal views about homosexuality.").

[306] *Dale*, 120 S. Ct. at 2462 (Stevens, J., dissenting) (discussing BSA's policy of advising scouts to seek advice about sex from family members, and recognizing that "Scoutmasters are, literally, the last person Scouts are encouraged to ask" about sexuality).

[307] *Id.* at 2449. Chief Justice Rehnquist himself recognized Dale's success: "By all accounts, Dale was an exemplary Scout." *Id.*

[308] *See* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 18.

[309] *See Dale*, 120 S. Ct. at 2476 (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,

By accepting BSA's confusion of Dale's apparent "viewpoint" and his status as a gay man, the Court missed the most obvious opportunity to recognize the error of this conflation. In *Runyon v. McCrary*, the Supreme Court rejected a private school's status-based exclusion of a black child from a school that maintained the belief that segregation was desirable.[310] The Court held that the First Amendment protected the school's right to maintain its viewpoint that segregation was desirable; what the First Amendment would not support, much less condone, was the right of that school to reject a child because he was black – a status-based distinction.[311] Similarly, the First Amendment should not be derogated, as in *Dale*, such that it operates to protect an organization's right to discriminate based on an individual's *status* as a gay man.[312] As the *Runyon* Court recognized: "[T]he Constitution . . . places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[313] Never, that is, until now.[314]

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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.

*Id.*

[310] Runyon v. McCrary, 427 U.S. 160, 175-76 (1976).

[311] *Id.*

[312] *See* Brief for the Society of American Law Teachers at 13, *Dale*, 120 S. Ct. 2446 (No. 99-699) (noting that "complying with a mandate not to engage in status-based discrimination does not require an endorsement of a belief in anything").

[313] *Runyon*, 427 U.S. at 176 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

[314] *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting) ("Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.'. . . Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority."); *see also* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 16. Professor Hunter argues that *Dale*'s holding "invites other organizations to quietly adopt resolutions of disapproval of homosexuality and then use them, not to require adherence to a philosophy, but simply to rid themselves of certain individuals, while leaving

### B. *Within the Proper Freedom of Expressive Association Framework, the Majority Goes Astray*

On its facts, *Dale* was very much like *Roberts*: both organizations were national in scope; both were limited to men only; both involved the exclusion of an individual because that person sought access to an organization very much a part of modern American culture.[315] Of course, there also were differences: the Boy Scouts did not have an explicit exclusionary policy regarding gay men,[316] whereas the Jaycees' policy of excluding women was clear;[317] and the Jaycees case involved only adult members, while the BSA case involved a man who had spent ten years of his childhood as a member, and then was rejected soon after becoming an adult member/leader.[318] The issues were distinguishable enough, however, that the United States Supreme Court believed it could reject the essence of *Roberts*' holding, and embrace BSA's desire to discriminate.[319]

The Court's first significant departure from precedent was its reinterpretion of the underlying constitutional right in question –

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others who disagree. . . . This flatly contradicts the Court's holding in *Runyon*." Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 16.

[315] *See* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 4 ("There is probably no private organization in the country which so promotes itself as an icon of citizenship as the Boy Scouts.").

[316] *Dale*, 120 S. Ct. at 2470 ("BSA's mission statement and federal charter say nothing on the matter [of homosexual membership]; its official membership policy is silent; its Scout Oath and Law – and accompanying definitions – are devoid of any view on the topic.").

[317] *See Dale*, 120 S. Ct. at 2469 n.15 (describing the exclusionary policies in *Rotary* and *Roberts*).

[318] *See supra* Part II (describing James Dale's history as a scout).

[319] *See Dale*, 120 S. Ct. at 2470 (Stevens, J., dissenting). Justice Stevens argued that the majority rejected the essence of the *Roberts* trilogy by not applying its mandate in the *Dale* case. *Id.* Instead of asking whether Dale's inclusion would "impose a 'serious burden' or a 'substantial restraint' upon the group's 'shared goals,'" Justice Stevens argued that the majority's opinion "pretermit[] this entire analysis." *Id.*

the freedom of association. *Roberts* had reiterated[320] a constitutional ideal first articulated in *De Jonge v. Oregon*,[321] and further established in *NAACP v. Alabama*.[322] The *Dale* majority, however, infused a "freedom of speech" concept from *Hurley*, and reoriented the *Roberts* trilogy for good.[323] As part of this reorientation, the Court refused to look intently at the petitioner's claim to find what was so essential in *Roberts* – a nexus between the claimed right to exclude, and the group's reason for existence in the first place.

Finally, the Court refused to recognize that the same discrimination that underscored the Jaycees' rejection of women as members also supported BSA's rejection of James Dale: the kind of "invidious discrimination" that the *Roberts* Court noted "cause[s] unique evils that government has a compelling interest to prevent."[324]

### *1. First Amendment First Principles: The Freedom of Association Is a Limited Constitutional Right*

As the Supreme Court acknowledged in *NAACP v. Alabama*, the right of expressive association flows from the First Amendment's freedoms of speech and assembly.[325] The rationalization is that these rights cannot be protected fully against state interference without the "correlative freedom to engage in group effort toward those ends."[326] Thus, to speak collectively, a group of people must be able to form as an organization to effectuate that

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[320] *See Roberts*, 468 U.S. at 622-23 (setting out the basic structure of the right of association, and its correlative right to choose not to associate); *see also supra* Part I.C (documenting the development of the *Roberts* trilogy).

[321] 299 U.S. 353 (1937); *see also supra* Part I.B.

[322] 357 U.S. 449 (1958); *see also supra* Part I.B.

[323] *Dale*, 120 S. Ct. at 2454; *see also* Part II.C (discussing how the Court's infusion of *Hurley* analysis changed the essence of the *Roberts* trilogy).

[324] *See Roberts*, 468 U.S. at 628.

[325] 357 U.S. 449, 460 (1958); *see also supra* Part I.B (discussing the development of the freedom of association).

[326] *Roberts*, 468 U.S. at 622.

speech.[327] The group's formation is then protected to the extent that the group maintains "shared goals."[328] This limit to the group's protected "speech" suggests the converse: those things about which the group does not maintain "shared goals" cannot be protected consequent to the First Amendment.[329]

The Court has recognized this limit on claimed First Amendment rights.[330] In the face of a compelling state interest, in fact, the Court has held that even an infringement of membership rights can be sustained,[331] so long as the state regulation is "unrelated to the suppression of ideas" and "cannot be achieved through means significantly less restrictive."[332] Thus, after *Roberts*, when a court acknowledged the existence of a compelling state interest, enforced with a regulation that is unrelated to the suppression of ideas, the group claiming a First Amendment defense must satisfy the court that its expressive purpose would be so hampered by the

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[327] *See* NOWAK & ROTUNDA, *supra* note 51, at 1118; *see also Roberts*, 468 U.S. at 623 (articulating how a legitimate state law "may impair the ability of the original members to express only those views that brought them together"); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 80 (1986) ("Freedom of association is not protected for its own sake, but only as a mechanism to promote other identifiable constitutional interests.").

[328] *Roberts*, 468 U.S. at 622; *see also Dale*, 120 S. Ct. at 2469 (Stevens, J., dissenting) ("The relevant question is whether the mere inclusion of the person at issue 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.'").

[329] *See, e.g.*, *Roberts*, 468 U.S. at 623. "Such a regulation may impair the ability of the original members to express *only those views that brought them together*." *Id.* (emphasis added).

[330] *See id.* "The right to associate for expressive purposes is not, however, absolute." *Id.*

[331] This, despite the fact that the Court has acknowledged that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.*

[332] *Id.* "In other words, the regulation of association must be narrowly tailored to promote an end that is unrelated to suppressing the message that will be advanced by the association and is unrelated to suppressing the association because of government disapproval of its purposes." NOWAK & ROTUNDA, *supra* note 51, at 1119.

forced inclusion that it would not maintain its "shared goals."[333] To win on First Amendment grounds, "the organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice."[334]

The *Dale* majority clearly got this wrong.[335] When faced with the opportunity to delve into BSA's beliefs that accepting a homosexual member would impact negatively on its ability to accomplish its expressive purposes, the Court instead chose to "give deference to an association's view of what would impair its expression."[336] As the dissent noted, this is "an astounding view of the law."[337] Justice Stevens noted the significance of this remarkable shift:

> 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. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record."[338]

If deference of this sort were sufficient, *Roberts* would never have made it to the Supreme Court, and women still would be barred from participating in the Jaycees. In order for the essence of

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[333] *Roberts*, 468 U.S. at 622. Of course, the court would also look to the extent to which the state's interest cannot be achieved "through means significantly less restrictive of associational freedoms." *Id.* at 623. In both *Roberts* and *Rotary*, however, the Court found instances where the forced inclusion of excluded members would not upset the expressive purpose of the respective organizations. *See Roberts*, 468 U.S. at 629; *Rotary*, 481 U.S. at 548.

[334] *Dale III*, 706 A.2d at 287; *see also* Robert N. Johnson, Board of Directors of Rotary International v. Rotary Club of Duarte*: Redefining Associational Rights*, 1988 B.Y.U. L. REV. 141, 151-2 (1988) ("R[otary] I[nternational]'s claim would not be upheld unless it could demonstrate that a significant purpose or objective would be adversely affected by admitting women.").

[335] *Dale*, 120 S. Ct. at 2469 (Stevens, J., dissenting).

[336] *Dale*, 120 S. Ct. at 2453.

[337] *Dale*, 120 S. Ct. at 2471 (Stevens, J., dissenting).

[338] *Id.* (quoting the majority opinion, *Dale*, 120 S. Ct. at 2451).

*Roberts* to remain, it is necessary that a court should determine what compelling interest triumphs – that of a private organization to maintain its own membership criteria, or that of a state to stamp out unlawful discrimination among its citizenry.[339] For a court to accomplish this, it must assess for itself the organization's true expressive purpose.

### 2. *There Is No Adequate Nexus*

In order to determine whether the forced inclusion of an unwanted member will violate an organization's freedom of association, a court must determine "whether the mere inclusion of the person at issue 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.'"[340] The *Dale* Court avoided this obligation articulated in the *Roberts* trilogy, possibly because a careful analysis of the nexus between BSA's expressive purpose and its desire to exclude Dale would have shown the Court that *Roberts'* mandate could not be satisfied.[341]

The *Dale* Court instead chose to "accept the Boy Scouts' assertion"[342] that Dale's inclusion "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints," despite the Court's suggestion that it was in fact exploring BSA's true expressive purpose.[343] In fact, the extent of its exploration of BSA's expressive purpose included two abbreviated analyses: first,

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[339] *See* Johnson, *supra* note 334, at 153 ("To determine whether a group's expressive interests are protected courts will balance competing interests – the state's interest in promoting equal access and eliminating damaging affects of invidious discrimination against expressive interests of the private club.").

[340] *Dale*, 120 S. Ct. at 2469 (Stevens, J., dissenting) (quoting from the *Roberts* trilogy cases which defined the proper standard the Court should follow when assessing the competing compelling interests).

[341] *See Dale II*, 734 A.2d at 1226 ("When contrasted with its 'all-inclusive' policy, Boy Scouts' litigation stance on homosexuality appears antithetical to the organization's goals and philosophy.").

[342] *Dale*, 120 S. Ct. at 2453.

[343] *Id.* ("This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.").

the Court accepted uncritically BSA's assertions that the Scout Oath and Law evidenced a disapproval of homosexual conduct;[344] and finally, the Court looked to three position statements about BSA's opinion of homosexuals in scouting, and found them sufficiently indicative of BSA's stance.[345] What the Court did not

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[344] *Id.* at 2452. The Court noted that BSA's assertion about the meaning of the Oath and Law were open to interpretation, and at least one of those interpretations could be that people "may believe that engaging in homosexual conduct is contrary to being 'morally straight' and 'clean.'" *Id.* The New Jersey Supreme Court had rejected this possibility because they had looked at the entire record of what BSA's expressive purpose was to inform its decision about the extent of the harm imposed on that purpose by Dale's inclusion. *See generally Dale II*, 734 A.2d 1196. This type of analysis, according to the *Dale* majority, was inappropriate. "[O]ur cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Dale*, 120 S. Ct. at 2452. Instead, the Court stated, it was enough to "accept the Boy Scouts' assertion." *Id.*

[345] *Dale*, 120 S. Ct. at 2453. The Court initially stated that it was enough to rely on BSA's assertion of its position on homosexuality as illustrated by the Scout Oath and Law. It went ahead with analysis of the policy statements, however, "because the record before [it] contain[ed] written evidence of the Boy Scouts' viewpoint." *Id.* Its goal in undertaking the analysis was limited, however: "we look to [the written evidence] as instructive, if only on the question of the sincerity of the professed beliefs." *Id.* The majority's entire analysis of the position statements was criticized severely in Justice Stevens' dissent:

> Four aspects of the 1978 policy statement are relevant to the proper disposition of this case. First, at most this letter simply adopts an exclusionary membership policy. . . . Second, the 1978 policy was never publicly expressed – unlike, for example, the Scout's duty to be "obedient." . . . Third, it is apparent that draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be "obedient" and "obe[y] the laws," even if "he thinks [the laws] are unfair" would prevail in such a contingency. . . Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts.

*Id.* at 2463-64 (Stevens, J., dissenting). The remaining position statements, all of which were issued "*after* BSA revoked Dale's membership," had "little, if any, relevance to the legal question before [the] Court." *Id.* at 2464. *See also* Marissa

do, however, that surely would have made its ultimate holding problematic, was to look to the complete record to determine, objectively, BSA's true expressive purpose.

The most obvious starting point for this analysis would have been to look to BSA's most prominent publication: the *Boy Scout Handbook* ("*Handbook*"). Because of the nature of this analysis, the Court should have considered its search akin to that of a prospective new scout: what does the *Handbook*, the primary educational tool for new scouts, say about this organization in regard to its expressive purpose?[346]

One section in the *Handbook* mentions sexuality, titled "Sexual Responsibility."[347] The section is a general prescription on a young man's obligations, to himself and to others. There are four sub-sections: "Your Responsibility to Young Women," "Your Responsibility As a Future Parent," "Your Responsibility to Your Beliefs," and "Your Responsibility to Yourself."[348] Throughout the text, there are references to "marriage" and "pregnancy."[349] These notions, of course, rely on the assumption of heterosexuality.[350] There is no language, however, that suggests a condemnation of anything other than heterosexuality. BSA points to language in the *Scoutmaster Handbook* that informs a scoutmaster as to what to do in the instance where a scout is discovered in a sexual situation with another scout.[351] The language cited, however, only

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L. Goodman, Note, *A Scout Is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 852-56 (1999) (discussing in detail the four position statements).

[346] HANDBOOK, *supra* note 156, at iii ("The Boy Scout Handbook you are holding is the road map to your Scouting adventure.").

[347] HANDBOOK, *supra* note 156, at 376-77. The sexuality materials are in the chapter entitled, "Getting Along With Others." HANDBOOK, *supra* note 156, at 367-81.

[348] HANDBOOK, *supra* note 156, at 376-77.

[349] HANDBOOK, *supra* note 156, at 376-77. "[T]he difficulties created by an unplanned pregnancy can be enormous. . . . Abstinence until marriage is a very wise course of action." HANDBOOK, *supra* note 156, at 376.

[350] Marriage, as of this date, is limited of course to heterosexual couples. *See* Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61 (1999).

[351] *See* Brief for Respondent at 15-16, *Dale II*, 734 A.2d 1196 (No. A-2427-

points to an obvious problem when a scout is "using his Scouting association to make contacts."[352] Nothing in the language condemns homosexuality itself as per se objectionable. What is defined as wrong, apparently and understandably, is when a scout – and not a scoutmaster – uses BSA in a predatory manner. This does not concern homosexuality. It concerns the issue of a sexually precocious child[353] or, if the offender is a scoutmaster, the issue of pedophilia.[354]

Other aspects of the *Handbook* suggest BSA's expressive purpose. Three sections describe the issue of developing and respecting community: "Citizenship," "Making the Most of Yourself," and "Getting Along With Others."[355] Within the texts on these pages, the *Handbook* defines a broad approach to the tolerance of differences. In "Know Your Neighbors," the section reads regarding "Ethnic Groups": "By accepting the differences among us, you will realize the wonderful variety and strength that different ethnic groups bring to a community."[356] A caption for a picture in the "World Community" section reads, "Reaching out to meet people who are different from you can lead to understanding and friendship."[357] In bold print at the beginning of the "Getting Along With Others" section, the *Handbook* states: "Over 270 million Americans share our nation. There are nearly 6 billion people on the planet, all with their own needs, hopes, and dreams. Learning about the extraordinary mix of cultures, histories, and

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95T3). "Incidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. It is important to distinguish between youthful acts of innocence, and the practices of a confirmed homosexual, who may be using his Scouting association to make contacts." *Id.*

[352] *Id.*

[353] In fact, the language in the Boy Scout *Handbook*, by implication, recognizes that heterosexual boys can be sexually precocious as well – hence the warning to avoid pre-marital sex. *See* HANDBOOK, *supra* note 156, at 376-77.

[354] This is an argument that BSA does not make in its brief, but which it implies in the essence of its argument.

[355] HANDBOOK, *supra* note 156, at 330-81.

[356] HANDBOOK, *supra* note 156, at 343.

[357] HANDBOOK, *supra* note 156, at 349.

religions can be great fun, and can lead to a deeper understanding of other people."[358]

In "Meeting People," scouts are told that "[t]alking to a person of a different race, religion, or generation might at first seem awkward, but others are probably just as shy as you are. Focus on making someone feel welcome, and you can open the door to understanding and friendship."[359] Similarly, in "Choosing Friends," the scout is told to "[l]ook beyond the differences that might separate you from others and accept them for who they are. You might be surprised how much you have in common and how much your differences can enrich friendships."[360] And finally, the Scout Law's definition of "clean" – the provision from which BSA seeks to portray how its expressive purpose is inconsistent with homosexuality – warns a scout about "foul language and harmful thoughts and actions":

> Swearwords and dirty stories are often used as weapons to ridicule other people and hurt their feelings. The same is true of racial slurs and jokes that make fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such tasteless behavior. He avoids it in his own words and deeds.[361]

The general approach presented in the *Handbook* is one of openness and acceptance to those who are different. Admittedly, none of these sections preaches tolerance for gays. An argument might be made that the issue of homosexuality is not appropriate for young children – including the typical scout.[362] On their own, these positions espoused by BSA may not indicate anything necessarily about the organization's expressive purpose. However, these sections, combined with BSA's policy for including all

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[358] HANDBOOK, *supra* note 156, at 367.

[359] HANDBOOK, *supra* note 156, at 368.

[360] HANDBOOK, *supra* note 156, at 370.

[361] HANDBOOK, *supra* note 156, at 53; *see supra* note 198 for the remainder of the Scout Law.

[362] The *Handbook* is targeted to boys ages eleven through eighteen. HANDBOOK, *supra* note 156, at 4.

boys,[363] are strong evidence that the scope of BSA's expressive purpose – its mission to inculcate strong values through camping, etc. – is open to all boys, regardless of their sexual orientation.[364]

As the New Jersey Supreme Court recognized, BSA is "emphatically inclusive."[365] In the BSA pamphlet, *A Representative Membership*, BSA "states that its 'national objective, as well as for regions, areas, councils, and districts is to see that *all eligible youth* have the opportunity to affiliate with the Boy Scouts of America.'"[366] The United States Supreme Court bypassed this analysis because recognizing it would have made its decision to reject *Roberts* that much more problematic.

An accurate and detailed analysis of BSA's expressive purpose would have shown that the organization does not associate to discriminate against gay men.[367] The position statements BSA

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[363] *See Dale II*, 734 A.2d at 1221 ("Any boy between the ages of eleven and seventeen can join; indeed, Boy Scouts has quite clearly said that 'any boy' is welcome."); *see also id.* at 1215 ("Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.") (quoting BSA pamphlet, *A Representative Membership*, at 2).

[364] In fact, BSA itself argues that questions of sexuality are better left for the home. *See Dale II*, 734 A.2d at 1203. "BSA 'believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.'" *Id.* (quoting an unidentified source).

[365] *Dale II*, 734 A.2d at 1215. "Boy Scouts accepts boys who come from diverse cultures and who belong to different religions. It teaches tolerance and understanding of differences in others. . . . Its Charter and its Bylaws do not permit the exclusion of any boy." *Id.* at 1217.

[366] *Id.* at 1215 (emphasis added) (quoting the BSA pamphlet, *A Representative Membership*, at 1). An "eligible youth" is any boy eleven to eighteen years of age, who has completed a BSA application and health history signed by parent or guardian; has found a scout troop near his home; is able to repeat the pledge of allegiance; can demonstrate the scout sign, salute and handshake; can demonstrate tying the square knot; understands and agrees to live by the Scout Oath and Law, Motto, Slogan and the outdoor code; can describe the scout badge; has completed various pamphlet exercises, and has participated in a scoutmaster conference. *See* HANDBOOK, *supra* note 156, at 4.

[367] *See Dale*, 120 S. Ct. at 2470 (Stevens, J., dissenting).

> The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. . . . In short, [BSA] is simply silent on homosexuality. There is no shared goal or

relied upon to convince the Court that it does maintain a policy of exclusion were irrelevant to the question of whether BSA's expressive purpose would be burdened by Dale's inclusion.[368] As Justice Souter articulated in his dissent, "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way."[369] Anything short of this test would turn the First Amendment into a tool for discrimination. The essence of Justice Souter's analysis is simple: unless the nexus between the exclusion and the "shared goals" of the organization is direct and obvious, the organization cannot claim a First Amendment violation.[370]

### 3. Roberts *Rejected the Same Discrimination* Dale *Embraces*

The conflation at the heart of the *Dale* Court's decision[371] is not new to the Court. In *Roberts*, it faced the same issue,[372] and

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> collective effort to foster a belief about homosexuality at all – let alone one that is significantly burdened by admitting homosexuals.

*Id.*

[368] *Id.*

[369] *Id.* at 2479 (Souter, J., dissenting) ("To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law.").

[370] *Id.* Justice Souter's argument makes a lot of the majority's analysis about BSA's position statements irrelevant. For even if BSA had adopted a clear policy, according to this analysis, it would not matter unless the essence of the exclusionary policy related directly to the group's shared goals. *See id.* at 2469 (Stevens, J., dissenting). Given the organization's history and its general approach to diversity, BSA would probably have to integrate anti-gay belief systems into its methods of inculcating values in order to satisfy the standard established in *Roberts*. *See infra* Part III.B.3 (discussing the type of discrimination found unlawful in *Roberts*).

[371] *See supra* Part III.A (describing how BSA successfully convinced the Court that Dale's status as a gay man would operate to project a viewpoint onto BSA as an organization).

[372] *See Roberts*, 468 U.S. at 627 (observing that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best").

its decision in rejecting the Jaycees' discriminatory posture was a resolution in favor of the state's compelling interest.[373] The *Roberts* Court was asked to accredit the Jaycees' belief that accepting women into their organization would result in a significant change in the organization's positions on important issues, because, as the Jaycees believed, including women "would necessarily result in 'some change in the Jaycees' philosophical cast.'"[374] The Court went to great pains to analyze this reasoning, and was clear in its assessment:

> In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations . . . or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women.[375]

What the *Roberts* Court did was to disaggregate the same conflation the *Dale* Court embraced. Instead of accepting as "sincerely held beliefs"[376] that women would change the Jaycees' nature, the *Roberts* Court found that these "unsupported generalizations" were not worthy of constitutional protection.[377] The Court rejected the shorthand: "woman" equals unsound policies on political and social issues. It rejected the notion that an organization could constitutionally conflate that a person's status – her gender – "said" anything

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[373] *Id.* at 624 ("That goal [of eliminating discrimination] . . . plainly serves compelling state interests of the highest order."); *see also Rotary*, 481 U.S. at 549. The *Rotary* Court, in fact, made a specific point of the fact that the state public accommodation law in question, the Unruh Act, "makes no distinctions on the basis of the organization's viewpoints." *Id.* The Court further noted: "Moreover, public accommodations laws 'plainly serv[e] compelling state interests of the highest order.'" *Id.* (quoting *Roberts*, 468 U.S. at 624).

[374] *Roberts*, 468 U.S. at 617 (quoting *Jaycees II*, 709 F.2d at 1571).

[375] *Id.* at 627-28.

[376] *See Dale*, 120 S. Ct. at 2453 ("We cannot doubt that the Boy Scouts sincerely holds this view.").

[377] *Roberts*, 468 U.S. at 628.

more than the fact that she was a woman.[378] This conflation was the very core of what the Court found objectionable:

> In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.[379]

The *Dale* Court did more than take a different path in analyzing similar facts; it rejected the very essence of what the *Roberts* Court found so objectionable.[380] Without overruling the *Roberts* trilogy, the Court instead simply gutted it of its anti-discriminatory power.[381]

Beyond whether BSA holds a belief that homosexuality is wrong, as analyzed under *Roberts*, the answer should not matter.[382] What should matter are the reasons behind why BSA wanted to exclude gay men. The answer to that question was never answered by BSA in a way that should have satisfied the United

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[378] *Id.*

[379] *Id.*

[380] *See supra* Part II.C (discussing the way the *Dale* Court changed the parameters of the law from *Roberts*).

[381] *See Dale*, 120 S. Ct. at 2470-72 (Stevens, J., dissenting).

> 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 2471; *see also* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1 (suggesting that the *Dale* decision "may portend a substantial rewriting of previous expressive association law because the Court seemed to lower the bar for how clearly an organization had to demonstrate the tension between its ability to communicate its beliefs and compliance with a civil rights law").

[382] *Dale*, 120 S. Ct. at 2469 (Stevens, J., dissenting) ("[I]t is not enough to adopt an openly avowed exclusionary membership policy."). In fact, in *Roberts*, the Jaycees had an explicit policy that women were not allowed, and were clearly on record in explaining their rationale. *See Roberts*, 468 U.S. at 613-14. The same was true for Rotary International. *See Rotary*, 481 U.S. at 539-41. This did not present a problem in either instance, as the Court found that, despite these policies, the underlying rationale was constitutionally infirm. *See Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628.

States Supreme Court after *Roberts*[383] – because all that BSA was able to say was that gay male *conduct* was, in their eyes, unacceptable to scouting.[384]

Long before *Roberts* was decided, people used to believe that women were incapable of being equal citizens such that they should be denied certain benefits.[385] What the *Roberts* Court did was to say that these beliefs of inferiority were insufficient to warrant constitutional protection in the face of compelling state interests to eradicate discrimination: "We have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions."[386] It was time, the Court determined, to reject gender inequality in the public accommodation sphere. *Dale* makes it equally clear that apparently it is not time, according to the Rehnquist Court, for the Constitution to afford the same assertion of equality for gay men.[387]

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[383] *Dale*, 120 S. Ct. at 2470 (Stevens, J., dissenting). Justice Stevens argued that the majority rejected the analysis dictated by the *Roberts* trilogy, and ignored the similarities that would have dictated a different outcome:

> There is no reason to give [a BSA internal policy statement about homosexuality] more weight than Rotary International's assertion that all-male membership fosters the group's "fellowship" and was the only way it could "operate effectively." As for BSA's post-revocation statements, at most they simply adopt a policy of discrimination, which is no more dispositive than the openly discriminatory policies held insufficient in Jaycees and Rotary Club; there is no evidence here that BSA's policy was necessary to – or even a part of – BSA's expressive activities or was every [sic] taught to Scouts.

*Id.*

[384] *Dale*, 120 S. Ct. at 2449 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill."); *see also* Brief for Petitioner at 25, *Dale*, 120 S. Ct. 2446 (No. 99-699) (describing "Boy Scouting's Beliefs About Homosexual Conduct").

[385] Certainly, many still believe so. It is without question that women remain unequal, in many contexts, to men, despite laws asserting otherwise, or a Court holding such actions to be unconstitutional.

[386] *Roberts*, 468 U.S. at 628.

[387] *See Dale*, 120 S. Ct. at 2477-78 (Stevens, J., dissenting). In Part VI of his dissent, Justice Stevens described the way that developing ideas of acceptance of gays and lesbians argued for a different opinion. *See id.* Chief Justice Rehnquist clearly missed the point in rejecting this argument in the majority:

## CONCLUSION

The aftermath of *Dale* has proved that the decision can hardly be seen as a success, from any perspective. BSA has been targeted for maintaining its discriminatory policy, with private groups and governmental organizations seeking to distance themselves from BSA.[388] Some have argued for trying to change the policy, despite the *Dale* decision, given the strong and primarily negative public reaction.[389] At least one of BSA's primary sponsors,

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"Justice Stevens' dissent makes much of its observation that the public perception of homosexuality in this country has changed . . . But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." *Dale*, 120 S. Ct. at 2457. In rejecting Justice Stevens' argument, clearly, Chief Justice Rehnquist is rejecting the rationale underlying the *Roberts* analysis. An argument about the developing beliefs about minority communities is not about justifying whether or not something deserves a First Amendment protection. Rather, developing acceptance of minorities informs the analysis about the "unsupported generalizations" and "archaic and overbroad assumptions about the relative needs and capacities of the sexes" that the *Roberts* Court found so constitutionally suspect. *Roberts*, 468 U.S. at 628, 625.

[388] See Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts*, N.Y. TIMES, Jan. 10, 2001, at A12; Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1; Andrew Jacobs, *Victory Has Consequences of Its Own*, N.Y. TIMES, June 29, 2000, at A28.

[389] *See* Claudia Kolker, *Scouts Pledge to Persevere in Face of Opposition to Ban on Gays Nationwide*, L.A. TIMES, Nov. 14, 2000, at A5; Stuart Taylor Jr., *Sure, They Can Exclude Gays. And Others – Even the President – Can Put Pressure on Them*, LEGAL TIMES, Sept. 11, 2000, at 76. A columnist at the *Chicago Sun-Times* described his own approach to trying to affect change in BSA's policy after the decision. *See* Mark Brown, *Scouts' Honor Is Undermined by Anti-Gay Policy*, CHIC. SUN-TIMES, Jan. 29, 2001, at 2. Mr. Brown described how he initially believed that remaining in scouts with his children would be a way "to work for change from within the group." *Id.* Mr. Brown changed his mind when he discovered that BSA had revoked the charters of seven local scout troops because those troops had informed the district offices that they were obligated to follow the non-discrimination policies of the local schools where the troops were affiliated. *Id.* Mr. Brown was shocked at BSA's stern reply: "If you're not willing to discriminate against gays, the Boy Scouts don't want you. Oak Park's tolerance is not to be tolerated." *Id.*

however – the Mormon Church – has stated that it would "withdraw from Scouting" if BSA admitted "openly homosexual scout leaders."[390]

The future of freedom of association law, and the power of *Roberts* in particular, may be the greater loss. To come to the conclusion that *Dale* was different from *Roberts*, the Court had to reorient *Roberts*' holding.[391] In doing so, the Court undermined some of the states' power to outlaw discrimination. As Justice Stevens noted in his dissent, the warnings of Justice Brandeis are especially relevant to the *Dale* Court's actions. "To stay [a state's] experimentation in things social and economic is a grave responsibility."[392] New Jersey's public accommodation law is an experiment in the process, and the *Dale* majority's actions stopped that experiment dead in its tracks – at least in how it relates to gay men in this context. Unless and until the United States Supreme Court overturns *Dale*, it will be constitutional to discriminate against gay men; the decision has "irreversibly affixed" them with "a constitutionally prescribed symbol of inferiority."[393] Chief Justice Rehn-

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[390] Brief of National Catholic Committee on Scouting, General Commission on United Methodist Men of the United Methodist Church, the Church of Jesus Christ of Latter-Day Saints, the Lutheran Church-Missouri Synod, and the National Council of Young Israel at 25, *Dale*, 120 S. Ct. 2446 (No. 99-699). According to their amici brief, the Mormon Church is "the largest single sponsor of Scouting units in the United States." *Id.* The other amici signing the brief warned of additional consequences to such a move: "The other amici would be forced to reevaluate their sponsorship of Scouting, with the serious possibility of reaching the same conclusion." *Id.*

[391] *Dale* was one in a series of cases decided recently which some commentators have suggested is illustrative of the fact that "[w]e are now in the midst of a remarkable period of right-wing judicial activism." Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23. Others have suggested that this rightward path is in fact an attempt to role back all of the federal anti-discrimination statutes, including Title VI. *See* David G. Savage, *Bias Claims Get Same 5-4 Answer from Justices: No Law: Discrimination Cases Are Consistent Losers*, L.A. TIMES, Apr. 29, 2001, at A1.

[392] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Dale*, 120 S. Ct. at 2459 (Stevens, J., dissenting).

[393] *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

quist's Court ignored Justice Brandeis' warnings, and "erect[ed its] prejudices into legal principles."[394]

[394] *New State Ice*, 285 U.S. at 311.