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Has the Supreme Court Created a Constitutional Shield for Private Discrimination against Homosexuals - A Look at the Future Remifications of Boy Scouts of America v. Dale

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HAS THE SUPREME COURT CREATED A CONSTITUTIONAL SHIELD FOR PRIVATE DISCRIMINATION AGAINST HOMOSEXUALS? A LOOK AT THE FUTURE RAMIFICATIONS OF *BOY SCOUTS OF AMERICA v. DALE*

I. INTRODUCTION

This case note will discuss the United States Supreme Court's analysis in *Boy Scouts of America v. Dale*,[1] a recent case in which the Court held that the application of a state's public accommodations law that required the Boy Scouts to retain an avowed homosexual in a leadership position violated the Boy

[1] 530 U.S. 640 (2000).

Scouts's First Amendment right of expressive association.[2] The Court noted that, generally, states have the power to enact public accommodations laws when the legislature "has reason to believe that a given group is the target of discrimination."[3] However, these laws may not impose any "serious burden" on an organization's right of expressive association.[4] Relying primarily upon the First Amendment analytical framework applied in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[5] the Court determined that Dale's position as an Assistant Scoutmaster would significantly "interfere with the Boy Scout's [sic] choice not to propound a point of view contrary to its beliefs."[6] In so holding, the majority applied a balancing test, with the state's interest in eliminating discrimination on one side of the scale, and the Boy Scouts's associational interest in freedom of expression on the other.[7] In this case, the Court refused to find that eliminating the effects of invidious discrimination against homosexuals was a compelling state interest.[8] Therefore, because New Jersey's public accommodations law did not address a compelling state interest, the Court found that the law unduly burdened the Boy Scouts's constitutional freedom of expressive association; that is, the Boy Scouts's interest in excluding homosexuals from its organization outweighed the state's interest in protecting that class of citizens from discrimination.[9]

This note addresses the significance of *Dale* in the evolving area of freedom of association jurisprudence. Part II defines state public accommodations laws and examines the scope of the state law at issue in *Dale*. Next, Part III examines the parameters of the First Amendment freedom of association. Part IV critiques the Court's opinion in *Dale*, particularly its application of *Roberts v. United States Jaycees*[10] and its reliance on *Hurley*. Part IV also includes a thorough examination of Justice Stevens's forceful dissent in *Dale*. Part V considers the precedential implications of *Dale* on the constitutional freedom of association and the applicability and scope of state public accommodations laws, as well as *Dale's* effect on progressive social policies. Finally, Part VI concludes that *Dale's* future viability may be in jeopardy and that, in fact, *Dale* must and will be challenged in order to further society's interest in the "eradica-

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2 *See id.*

3 *Id.* at 658 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995)).

4 *Id.*

5 515 U.S. 557 (1995).

6 *Dale*, 530 U.S. at 654.

7 *See id.* at 658-59.

8 *See id.* at 659.

9 *See id.*

10 468 U.S. 609 (1984).

tion of 'the cancer of discrimination.'"[11]

II. STATE PUBLIC ACCOMMODATIONS LAWS

Most every state has a statute prohibiting places of public accommodation[12] from discriminating on specified bases, most commonly including race, religion, color, age, and sex.[13] At issue in *Dale* was New Jersey's public accommodations statute, the Law Against Discrimination (hereinafter "LAD"), which went beyond the traditional scope of such statutes when, in 1991, it was amended to include "affectional or sexual orientation."[14] The New Jersey Legislature passed the amendment after determining that practices of discrimination "are matters of concern to the government of the State" because "such discrimination threatens . . . the rights and proper privileges of the inhabitants of the State," and that "people suffer personal hardships, and the State suffers a grievous harm."[15] New Jersey "prides itself on judging each individual by his or her merits," and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society."[16]

The Boy Scouts of America (hereinafter "BSA") has faced numerous court challenges to its exclusionary membership policies under state public accommodations laws. Through these challenges, brought on behalf of girls, atheists, and homosexuals, four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have held that BSA is not a place of public accommodation.[17] In a groundbreaking decision, however, the Supreme Court of New Jer-

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[11] Fuchilla v. Layman, 537 A.2d 652, 660 (N.J. 1988) (quoting Jackson v. Concord Co., 253 A.2d 793, 799 (N.J. 1969)).

[12] A "public accommodation" is generally a business establishment which is open to the public and provides lodging, food, entertainment, recreation, or other services. *See* BLACK'S LAW DICTIONARY 995 (7th ed. 1999).

[13] Thomas E. Baker, *Can a State Require the Boy Scouts to Appoint an Assistant Scoutmaster Who Is Gay?*, 1999-2000 PREVIEW U.S. SUP. CT. CAS. 360, 361. West Virginia, for example, prohibits a place of public accommodation from discriminating because of "race, religion, color, national origin, ancestry, sex, age, blindness or disability." W. VA. CODE § 5-11-9(6) (2001). Public accommodations laws are, therefore, the functional equivalent of anti-discrimination or civil rights statutes.

[14] The LAD provides: "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, familial status, or sex . . . ." N.J. STAT. ANN. § 10:5-4 (West 2000).

[15] *Id.* § 10:5-3.

[16] Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465, 478 (N.J. 1978).

[17] *See* Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993), *aff'g* 787 F. Supp. 1511 (N.D. Ill. 1992), *cert. denied*, 510 U.S. 1012 (1993); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998); Randall v. Orange County Council, Boy Scouts of Am., 952 P.2d 261 (Cal. 1998); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on

sey departed from these decisions in unanimously holding that BSA does fall within the scope of New Jersey's LAD.[18] In reaching this conclusion, the court first remarked that because the LAD was remedial in nature, it should be liberally construed to effectuate its purpose and objectives.[19] Next, the court reasoned that "the statutory noun 'place' . . . is a term of convenience, not of limitation,"[20] because "places do not discriminate; people who own and operate places do."[21] Then, the court held that BSA was a "public accommodation" because it "engages in broad public solicitation, . . . maintains close relationships with the government . . . [and] is similar to enumerated or other previously recognized public accommodations."[22] Despite the importance of this aspect of the holding, however, there is a second aspect of the Supreme Court of New Jersey's holding that is even more significant—that applying the LAD to the Boy Scouts in order to require the group to retain a homosexual member did not violate BSA's First Amendment freedom of association.[23]

III. THE FIRST AMENDMENT FREEDOM OF ASSOCIATION

The First Amendment does not explicitly mention the right of association; however, the Supreme Court has long inferred the right to associate with other individuals "as being a necessary corollary of the rights that are mentioned in the text."[24] Freedom of association was first recognized in the 1958 case of

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Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976).

18 Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

19 *Id.* at 1208, 1217.

20 *Id.* at 1209 (quoting Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974)).

21 *Id.* at 1210 (citing Dale v. Boy Scouts of Am., 706 A.2d 270, 279 (N.J. Super. Ct. App. Div. 1998) (quoting *Welsh*, 993 F.2d at 1282 (Cummings, C.J., dissenting))), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000). Here, the court noted that other jurisdictions had interpreted the term "place" to be "a limiting factor encompassing only a fixed location." *Id.* at 1209. The New Jersey Supreme Court departed from these decisions because it recognized that some public accommodations, such as Little League and the Boy Scouts, are provided at "a moving situs." *Id.* at 1210 (quoting *Little League*, 318 A.2d at 37).

22 *Id.* at 1210. This decision affirmed the superior court's holding, which was based on the following factors: the "BSA invites the public at large" and is "dependent upon the broad-based participation of members of the general public," it "engages in [nationwide] advertising and public promotion," it shares "many attributes in common" with the places enumerated in the LAD, and it has a "historic partnership with various public entities and public service organizations." *Dale*, 706 A.2d at 280-82 (citations omitted).

23 *Dale*, 734 A.2d at 1222-23, 1225.

24 Baker, *supra* note 13, at 362.

NAACP v. Alabama ex rel. Patterson,[25] in which the Supreme Court commented on the "close nexus between freedoms of speech and assembly" and declared that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[26] A later decision reaffirmed the *Patterson* holding, stating that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others."[27]

The Court has analyzed the freedom of association in two distinct contexts. "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State . . . ."[28] These are referred to as "intimate association" cases.[29] The boundaries of intimate association typically encompass family affairs including marriage, child bearing and rearing, and cohabitation with relatives.[30] This freedom, however, is not restricted to family relationships; rather, it also includes those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspects of one's life."[31] "In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment . . . ."[32] These are described as "expressive association" cases.[33] Generally, the Court has not given the freedom of expressive association a broad construction. Rather, its scope has been limited to "*a right to join with others to pursue goals independently protected by the first amendment.*"[34]

Just as the government is not absolutely barred from impairing the freedom of speech and other First Amendment rights, it is also not absolutely forbidden from impairing the freedom of association.[35] However, because associational freedom is a "fundamental element of liberty protected by the Bill of Rights,"[36] any state statute that more than an incidentally infringes on this fun-

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25 357 U.S. 449 (1958).

26 *Id.* at 460.

27 Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

28 *Id.* at 617-18.

29 *Dale*, 734 A.2d at 1219 (citing *Roberts*, 468 U.S. at 617-18).

30 Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

31 *Roberts*, 468 U.S. at 620.

32 *Id.* at 618.

33 *Dale*, 734 A.2d at 1219 (citing *Roberts*, 468 U.S. at 618).

34 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1013 (2d ed. 1988).

35 *See Roberts*, 468 U.S. at 622-23.

36 Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

damental right will be strictly scrutinized.[37] In order for a state to enact laws that interfere with protected associational activity, it must show that it is pursuing a compelling objective, "unrelated to the suppression of ideas," that cannot be achieved by any "means significantly less restrictive of associational freedoms."[38] One governmental interest that has almost always been found to be compelling is the elimination of discrimination based on race, sex, or other traditionally suspect criteria.[39] For example, the Supreme Court has held that a state could constitutionally require the Jaycees to admit women members, despite an incidental infringement on the group's freedom of association.[40]

Accordant with the right to associate, the Court has also recognized a right *not* to associate, which implies that an organization has a First Amendment interest in not being forced to accept unwanted members.[41] In *Roberts v. United States Jaycees*, the Court stated, "There 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. . . . Freedom of association therefore plainly presupposes a freedom not to associate."[42]

IV. A CRITIQUE OF *BOY SCOUTS OF AMERICA V. DALE*

In a recent freedom of association case, James Dale challenged BSA's policy of excluding avowed homosexuals after the organization revoked Dale's membership upon learning of his openly gay status.[43] Having lost at the state level,[44] BSA appealed the *Dale* decision to the U.S. Supreme Court, arguing that the LAD, as applied, violated its First Amendment rights.[45] In fact, BSA made

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37 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

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

39 *See id.* at 623-26.

40 *See id. See also Rotary Club*, 481 U.S. 537 (holding that California could constitutionally force the Rotary Clubs in that state to admit women).

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

42 *Id. Accord* Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (stating that part of the freedom of association is "the freedom to identify the people who constitute the association, and to limit the association to those people only").

43 *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1204-05 (N.J. 1999) (discussing Dale's exemplary twelve years in BSA, during which time he earned many of Boy Scouts's highest honors and leadership positions, and was ultimately approved as an Assistant Scoutmaster), *rev'd*, 530 U.S. 640 (2000). BSA revoked Dale's membership in 1990 when it discovered that Dale was a co-president of the Rutgers University Lesbian/Gay Alliance. *Id.*

44 *See Dale*, 734 A.2d 1196.

45 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). The New Jersey Supreme Court's determination that BSA was subject to its state's LAD was final and binding on the U.S. Supreme Court. Baker, *supra* note 13, at 361-62. Thus, the U.S. Supreme Court's review was limited only to the First Amendment issues. *See id.*

three arguments invoking three separate aspects of the First Amendment. At the core of all three arguments was the Boy Scouts's contention that homosexual conduct is inconsistent with the system of values that it seeks to instill in young boys.[46] First, BSA made a freedom of speech claim, arguing that the adult troop leaders are agents of the Boy Scouts, and that "BSA speaks directly and symbolically through them and their leadership."[47] Second, BSA argued that it is an "expressive association," and therefore its membership and leadership policies are protected aspects of the First Amendment right of expressive association.[48] Third, BSA argued that the personal bonds and close relationships between scouts and their leaders qualify for protection under the freedom of "intimate association."[49] Even though local Boy Scout troops appear to foster "close interpersonal and mentoring relationships that seem worthy of consideration" in the context of freedom of intimate association,[50] the state courts quickly dismissed BSA's intimate association claim.[51] The reasons for the courts' dismissals of this claim were best summarized by the New Jersey Supreme Court, which stated that "[a]s applied to 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."[52] Giving its implicit approval to the lower court's findings, the Supreme Court did not even consider BSA's intimate association claim.[53] Therefore, the scope of this note is confined to a consideration of the freedom of speech and freedom of expressive association issues.

A. Dale's *Analogy to Freedom of Speech Jurisprudence*

In *Dale*, the United States Supreme Court held that New Jersey's LAD, as applied to require BSA to retain James Dale as a member, violated BSA's

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46 *See Dale*, 530 U.S. at 644.

47 Baker, *supra* note 13, at 362.

48 *See id. See also Dale*, 734 A.2d at 1223-24.

49 *See Dale*, 734 A.2d at 1221-22.

50 Recent Case, *Civil Rights–Public Accommodation Statutes–New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership to Homosexuals*, 113 HARV. L. REV. 621, 624 (1999).

51 *Compare* Dale v. Boy Scouts of Am., 706 A.2d 270, 286 (N.J. Super. Ct. App. Div. 1998) (stating that "Freedom of intimate association is not implicated here"), *with Dale*, 734 A.2d at 1222 (holding that "Boy Scouts has not demonstrated a protectable intimate association right under the First Amendment").

52 *Dale*, 734 A.2d at 1221 (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987)).

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

First Amendment right of expressive association.[54] The majority opinion, authored by Chief Justice Rehnquist, indicates the inter-relatedness of expressive association and freedom of speech. Indeed, both the Court's holding and its entire analysis are phrased only in terms of expressive association; nonetheless, the body of the opinion ends with the following statement: "[T]he law . . . is not free to interfere with *speech* for no better reason than promoting an approved message or discouraging a disfavored one . . . ."[55] The *Dale* opinion thus demonstrates the close nexus between expressive association and speech—both convey a message or a set of ideas.[56] The distinction is this: the textual freedom of speech provided in the First Amendment is pure speech, or speech *per se*, while freedom of expressive association is speech or expression *via* association.[57] The substantive and practical impacts of the connection between these two doctrines will become apparent in the discussion that follows.

B. The Roberts *Trilogy*

A trilogy of modern Supreme Court cases established a framework for deciding *Dale*. The leading case is *Roberts v. United States Jaycees*.[58] The Jaycees, a traditionally all-male organization designed to promote the civic interests of its members, brought an action arguing that the application of Minnesota's public accommodations law requiring the organization to admit women members violated the group's First Amendment freedom of association.[59] The Court acknowledged that the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[60] A government action may unconstitutionally violate a group's right of expressive association by intruding into a group's internal affairs and forcing it to accept a member it does not desire.[61] However, "the freedom of expressive association, like many freedoms, is not absolute."[62]

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54 *See id.* at 644.

55 *Id.* at 661 (emphasis added). Additionally, Justice Stevens states in his dissent that "[t]he majority holds that New Jersey's law violates BSA's right to associate and its right to free speech." *Id.* at 664.

56 *See supra* text accompanying notes 26-27, 32-34.

57 Indeed, the act of joining a particular organization often sends a message. For example, if one were to join PETA, one would be expressing the message that he or she supports the humane treatment of animals, while membership in the NRA sends a message advocating one's Second Amendment right to bear arms.

58 468 U.S. 609 (1984).

59 *Id.* The Jaycees tried to invoke the right to both intimate and expressive association in defending its exclusion of women. *See id.*

60 *Id.* at 622.

61 *See id.* at 623.

62 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

Rather, that freedom can be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[63] Rejecting the Jaycees' argument, the *Roberts* Court thus held that Minnesota could constitutionally require the Jaycees to admit women members, even though there may have been some impairment of existing members' freedom of association or freedom of speech.[64] Minnesota's desire to eliminate discrimination against women in places of public accommodation was a compelling interest unrelated to the suppression of ideas.[65] The Court further found that the State's law was the least restrictive means of achieving that goal.[66] In short, the Minnesota statute did not "impose[] any serious burdens"[67] on the Jaycees' "collective effort on behalf of [its] shared goals."[68]

The *Roberts* Court thus provided the basic legal framework applicable to freedom of association cases. Under *Roberts*, a state law that infringes upon associational freedoms must pass a three-part strict scrutiny test: the law or regulation must (1) serve a compelling state interest (2) that is unrelated to the suppression of ideas (3) that cannot be achieved by any less restrictive means.[69] In applying this test, a court must ascertain the "shared goals" for which a given group is organized and then inquire as to whether the law being challenged imposes any "serious burdens" on the group's ability to achieve those goals.[70]

Two subsequent cases followed the *Roberts* framework. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court again considered a freedom of association challenge to a state anti-discrimination statute.[71] When a local Rotary Club chapter admitted women in compliance with California's anti-discrimination law, its charter was revoked by Rotary International.[72] The local chapter and its female members challenged the national organization's exclusionary policy under the California statute.[73] Rotary International, a non-profit business and professional organization, argued that, under the First Amendment, it had protected intimate association interests in maintain-

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

64 *See id.*

65 *Id.* at 623-26.

66 *Id.* at 626-28.

67 *Id.* at 622.

68 *Id.* at 626.

69 *See id.* at 623.

70 *Id.* at 622, 626.

71 481 U.S. 537 (1987).

72 *See id.* at 541. Under Rotary International's constitution, women were excluded from membership. *Id.*

73 *See id.* at 541-42.

ing an all-male "fellowship" and selecting its members, as well as a right "to associate for the purpose of engaging in protected speech."[74] The Court first held that because of Rotary International's otherwise open and inclusive membership policies (inclusive of everyone but women), the relationships among the clubs' members were not "sufficiently personal or private to warrant constitutional protection" under the freedom of intimate association.[75] As in *Roberts*, the Court also rejected the expressive association claim, concluding that admitting women to Rotary Clubs would not "affect in any significant way" the clubs' ability to carry out their "basic goals of humanitarian service [and] high ethical standards in all vocations."[76] Although Rotary Clubs engage in a variety of activities that are protected by the First Amendment, the California statute "does not require the clubs to abandon or alter any of these activities."[77] Moreover, Rotary would not be required to abandon its fundamental membership criteria.[78] To be sure, whatever slight infringement the California statute worked on the Rotary members' right of expressive association, "that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."[79]

So, in following *Roberts*, the *Rotary* Court added another set of inquiries to a proper strict-scrutiny analysis in a freedom of association case. As in *Roberts*, the *Rotary* Court inquired as to whether the application of the challenged state anti-discrimination statute would significantly affect the group's ability to carry out its basic, shared goals.[80] Additionally, the Court questioned whether the application of the law would require the group to "abandon or alter" either its activities or its fundamental membership criteria.[81] Answering each of these questions in the negative leads the Court to conclude that the law is the least restrictive means of serving a compelling state interest that is unrelated to the suppression of ideas.

The final case in the *Roberts* trilogy is *New York State Club Ass'n, Inc. v. City of New York*.[82] Applying the three-part strict scrutiny analysis of *Roberts* by way of those inquiries set forth in both *Roberts* and *Rotary*, the Court rejected a challenge to the constitutionality of a New York City law forbidding discrimination by clubs with more than 400 members, finding that the law did

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74 *Id.* at 541, 544.

75 *Id.* at 546-47.

76 *Id.* at 548.

77 *Id.*

78 *Id.*

79 *Id.* at 549.

80 *See id.* at 548.

81 *See id.*

82 487 U.S. 1 (1988).

not require the club "to abandon or alter" any activities protected by the First Amendment.[83] The Court held that forced membership is unconstitutional if the presence of an unwanted person affects in a significant way the group's ability to advocate public or private viewpoints.[84] Thus, in order to prevail on a freedom of association claim, the group must "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."[85]

To summarize the precedent set by the *Roberts* trilogy, the Supreme Court made it clear that state laws that infringe on constitutional rights of association would be strictly scrutinized. However, it seems equally apparent that the Court would generally defer to states' interests in prohibiting discrimination in places of public accommodation. To be sure, the Court struck down challenges to all three of the anti-discrimination statutes at issue in the *Roberts* trilogy cases. However, as the ensuing discussion of the *Dale* decision demonstrates, the Court does not believe that the prevention of *all* forms of discrimination rises to the level of a compelling state interest and, therefore, certain anti-discrimination laws will be found to have been unconstitutionally applied.

C. *The* Dale *Majority's Application of* Roberts

Beginning with the premise that the freedom of expressive association is not absolute,[86] the Supreme Court applied the framework from the *Roberts* trilogy in the form of a three-part test to determine whether the Boy Scouts had a protected expressive association interest in excluding James Dale.[87] The first part of the test is that the group must actually engage in "expressive association."[88] This element is fairly easy to meet—the group must only engage in "some form of expression, whether it be public or private."[89] The Court concluded that the Boy Scouts's general mission to instill values in young people is indisputably an expressive activity.[90] Because BSA engaged in expressive ac-

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83 *Id.* at 13 (quoting *Rotary Club*, 481 U.S. at 548). The state law provided that an organization with more than 400 members could not avoid being classified as a "public accommodation" by claiming to be a "private" club. *Id.* at 5-6.

84 *Id.* at 13-14.

85 *Id.* at 13.

86 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

87 *See* 530 U.S. 640.

88 *Id.* at 648.

89 *Id.*

90 *Id.* at 649. The majority looked to Justice O'Connor's concurrence in Roberts v. United States Jaycees, which stated that protected expression may "take the form of . . . inculcation of traditional values, [and] instruction of the young . . . . Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468

tivities, those activities were presumptively entitled to protection under the First Amendment.

For the second part of the test, the Court asked "whether the forced inclusion of Dale as an assistant scoutmaster would *significantly affect* the Boy Scouts' [sic] ability to advocate public or private viewpoints."[91] Here, the Court gave deference to BSA's assertions regarding the nature of its expression, as well as BSA's view of what would impair that expression.[92] "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."[93] Thus, the Court accepted BSA's assertions that it teaches that homosexual conduct is immoral and that Dale's status as a gay rights activist would interfere with BSA's expression.[94]

In a departure from the reasoning followed by the lower courts,[95] the Supreme Court then applied *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[96] *Hurley* involved a gay and lesbian group that was refused a place in a St. Patrick's Day parade organized by a Boston Veteran's Council.[97] The state court admitted the group into the parade, holding that the parade was a public accommodation under Massachusetts law and that mandating inclusion of the group did not infringe upon the Council's right of expressive association.[98] In reversing, the U.S. Supreme Court focused on the Council's freedom of speech and reasoned that in a parade, the message of the private organizers is shaped by all those who participate in the parade.[99] Thus, the application of the Massachusetts law violated the "autonomy [of the speaker] to

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U.S. 609, 636 (1984).

91 *Dale*, 530 U.S. at 650 (emphasis added). *See also* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988) (holding that forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate its viewpoints).

92 *Dale*, 530 U.S. at 651-52.

93 *Id.* at 651 (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.")). Moreover, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *La Follette*, 450 U.S. at 123-24.

94 *Dale*, 530 U.S. at 651-52.

95 *See infra* text accompanying notes 101-103.

96 515 U.S. 557 (1995).

97 *See id.* at 561. The parade organizers did not object to simply allowing gays and lesbians to march in the parade—the fight was about whether the gays should be allowed to march in their *own* unit under their *own* banner. *See id.* at 570, 572.

98 *See id.* at 561-63.

99 *See id.* at 572-73. The Court felt that forcing the inclusion of the gay group would, in effect, be forcing the parade organizers to send a message supporting gay rights—a message that they had a right to refuse to endorse. *Id.* at 574-75.

choose the content of his own message."[100] In the *Dale* case, both of the New Jersey appellate courts below had distinguished *Hurley* from *Dale*, reasoning that *Hurley* was a "pure speech" case, whereas *Dale* was an expressive association case.[101] Indeed, in the lower state appellate decision, the court pointed out that, unlike *Hurley*, *Dale* did not involve "pure forms of speech," or a plaintiff who was "asserting a right . . . to alter the content of the [organization's] viewpoint."[102] The Supreme Court of New Jersey reaffirmed this analysis by stating:

> We find the facts of *Hurley* distinguishable. Dale's status as a scout leader is not equivalent to a group marching in a parade. . . . Nor is Boy Scout leadership a form of "pure speech" akin to a parade. . . . We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality.[103]

Rejecting the lower courts' distinction between *Hurley* and *Dale*, the U.S. Supreme Court concluded that Dale's presence in Boy Scouts "would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[104] Therefore, BSA met the second element of the *Roberts* test, because the forced inclusion of Dale would *significantly affect* BSA's right to refuse to support gay rights and lifestyles.[105] The Court's finding that the application of the LAD had a significant effect on BSA's protected First Amendment rights triggered the Court's strict scrutiny analysis of the New Jersey statute.

Moving to the third part of the *Roberts* test, the Court asked whether the application of New Jersey's LAD to require the Boy Scouts to retain Dale as an Assistant Scoutmaster violated the Scouts's freedom of expressive association.[106] This inquiry entailed a balancing test in which "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other."[107] In evaluating these competing interests, the Court rejected Dale's argument advocating the application of the same intermediate

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100 *Id.* at 573.

101 *See infra* text accompanying notes 102-03.

102 Dale v. Boy Scouts of Am., 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

103 Dale v. Boy Scouts of Am., 734 A.2d 1196, 1229 (N.J. 1999) (discussing *Hurley*, 515 U.S. at 557), *rev'd*, 530 U.S. 640 (2000).

104 Boy Scouts of Am. v. Dale, 530 U.S. at 653.

105 *See id.* at 655-56.

106 *See id.* at 656. It should be emphasized here that the Court evaluated the LAD *as applied*, rather than assessing the constitutionality of the statute on its face.

107 *Id.* at 658-59.

standard of review used in *United States v. O'Brien*.[108] Comparing *O'Brien* to *Dale*, the Court distinguished the two because "[a] law prohibiting the destruction of draft cards only *incidentally* affects the free speech rights of those who happen to use a violation of that law as a symbol of protest."[109] On the other hand, "New Jersey's public accommodations law *directly* and *immediately* affects associational rights . . . . Thus, *O'Brien* is inapplicable."[110] Again, because New Jersey's LAD had more than an incidental effect on BSA's First Amendment rights, the LAD was subject to strict scrutiny, rather than a lower, intermediate level of scrutiny.

With very little analysis, the Court again compared *Dale* to *Hurley*, and determined that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' [sic] rights to freedom of expressive association."[111] It took the Court only one brief paragraph to conclude that the LAD so significantly burdened BSA's First Amendment "right to oppose or disfavor homosexual conduct" that that right far outweighed any state interest in eliminating discrimination against homosexuals.[112] In other words, the Court believed that the State of New Jersey did not have a compelling state interest in protecting gays from discrimination and, as a result, the LAD's application to the Boy Scouts failed the strict scrutiny test. In an apparent effort to justify its meager analysis on this point, the Court mentioned in a footnote that "[w]e anticipated this result in *Hurley* when we . . . liken[ed] the parade to a private membership organization. . . . [which] 'could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.'"[113] Thus, the Court held that "the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law."[114]

D. *The* Dale *Majority's Reliance on* Hurley

The Supreme Court's reliance on *Hurley* in reaching its decision in *Dale* is most significant. Despite the fact that the Court applied the *Roberts* framework in formulating a three-part test for expressive association cases, the Court did not reach the result that the *Roberts* trilogy would predict. Indeed, Justice

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[108] *See id.* (citing *O'Brien*, 391 U.S. 367 (1968)). The *O'Brien* Court used a four-part test to review a law that prohibited the destruction of draft cards. *See* 391 U.S. at 376-77.

[109] *Dale*, 530 U.S. at 659 (emphasis added).

[110] *Id.* (emphasis added).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 659 n.4 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 580-81 (1995)).

[114] *Id.* at 659.

Stevens pointed out the error in the majority's reasoning by stating:

> Several principles are made perfectly clear by [*Roberts*] 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. . . . Second, it is not enough to adopt an openly avowed exclusionary membership policy. . . . Third, it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy.[115]

Accordingly, the proper test from the *Roberts* trilogy, according to Justice Stevens, is whether the state law at issue "imposes any *serious burden*" on an organization's "collective effort on behalf of [its] *shared goals*."[116] Relying on considerable factual support from the record, Stevens argued that "[t]he notion that an organization of [BSA's] size and enormous prestige implicitly endorses the views that each of those adults [(leaders)] may express in a non-Scouting context is simply mind boggling."[117] The majority, however, disagreed with both Stevens and the courts below,[118] and found the facts of *Dale* analogous to *Hurley*. Without its application of *Hurley*, the Court could not have concluded that parts two and three of the *Roberts* test were met. Indeed, Chief Justice Rehnquist wrote:

> 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 [sic] choice not to propound a point of view contrary to its beliefs.[119]

Thus, applying the same "traditional First Amendment analysis" as in *Hurley*, the Court was able to conclude that New Jersey's LAD violated the First Amendment rights of the Boy Scouts.[120] The Court's error in relying upon *Hurley* will become evident in the following discussion.[121]

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115 *Id.* at 682 (Stevens, J., dissenting).

116 *Id.* at 683 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622, 626 (1984)).

117 *Id.* at 697.

118 *See supra* text accompanying notes 101-03.

119 *Dale*, 530 U.S. at 654.

120 *Id.* at 659. *See also supra* text accompanying notes 111-114.

121 *See infra* text accompanying notes 188-97.

E. Justice Stevens's Dissent

The majority opinion in *Dale* was countered with a vigorous dissent by Justice Stevens.[122] Stevens began with the premise that federal courts should not deter states from experimenting in "things social"[123]—that is, states should be free to "serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country."[124] New Jersey, in amending its LAD to include homosexuals as a protected class, was one of these "courageous" states,[125] and, according to Stevens, it is not the proper role of federal courts to deter such experimentation.[126] Justice Stevens then argued that the majority got it wrong—that the *Roberts* test *was* met (and, therefore, the LAD did not abridge the Boy Scouts's constitutional rights) because New Jersey's LAD did not "impose any serious burdens" on BSA's "collective effort on behalf of [its] shared goals,"[127] nor did it force BSA to send a message that it did not wish to endorse.[128]

Looking at the facts of the case, Stevens pointed out that it was quite clear that Dale's more than twelve years of membership in BSA were nothing less than exemplary.[129] In fact, he attained the rank of Eagle Scout, an honor awarded to only the top three percent of all scouts, and was ultimately chosen to be an Assistant Scoutmaster.[130] Only after the Boy Scouts found out that Dale had "come out of the closet" while away at college did the organization revoke his membership.[131]

In its defense of Dale's suit, BSA argued that it teaches young boys that homosexuality is immoral; therefore, forcing BSA to accept members who violate this "shared" value of scouting would abridge the group's constitutional right to associate.[132] On this point, Stevens's opinion radically diverged from

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122 *See Dale*, 530 U.S. at 663-700. Justices Souter, Ginsberg, and Breyer joined in Justice Stevens's dissent.

123 *Id.* at 664.

124 *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

125 *Id.*

126 *Id.*

127 *Id.* at 664-65 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622, 626 (1984)).

128 *Id.* at 665.

129 *See id.*

130 *Id.*

131 *See id. See also* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1204-05 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000). Dale was understandably shocked by his expulsion—not only had the Scouts bestowed numerous honors and awards upon Dale, but had even held him in such high esteem that he was chosen to attend national events and other organized Boy Scouts functions, where he spoke on behalf of BSA. *Id.*

132 *Dale*, 530 U.S. at 665 (Stevens, J., dissenting).

that of the majority. The majority gave absolute deference to BSA's assertions regarding the nature of its values (and, accordingly, the nature of its expression), as well as to BSA's beliefs about what would impair the expression of those values.[133] Stevens, on the other hand, closely examined the facts on record to determine exactly what values BSA actually teaches.[134] The record indicated that the purposes for which BSA was organized were to instill values in young boys by teaching patriotism, courage, and self-reliance.[135] The Boy Scouts prided itself on having a "representative membership."[136] In fact, it emphasized that "neither the charter nor the bylaws . . . permits the exclusion of any boy."[137] Nevertheless, despite the all-inclusive nature of the Scouts, the group argued that a limiting factor placed upon membership eligibility was acceptance and adherence to the "Scout Oath" and "Scout Law."[138]

Within its seemingly innocent Oath and Law, BSA found two key terms upon which it hung its entire case—that boys who join BSA agree to be "morally straight" and to keep themselves "clean."[139] Justice Stevens examined the history of these terms by looking at the definitions provided in the Boy Scout Handbook.[140] Therein, "morally straight" is defined as having "strong character," and being guided by "honesty, purity, and justice."[141] Moreover, "morally straight" means that a scout will "*[r]espect and defend the rights of all people*," be "honest and open," and have the "courage" to do what he thinks is right, as well as to "refuse to do what his heart and head say is wrong."[142] As for the term "clean," the Handbook instructs boys that they are not to use words as "weapons that ridicule"[143]—that a scout always acts with "kindness [and] honor" in word

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133 *See id.* at 653-55. *See also supra* text accompanying notes 92-94.

134 *See Dale*, 530 U.S. at 665 (Stevens, J., dissenting).

135 *Id.* at 666.

136 *Id.*

137 *Id.*

138 *See id.*

139 *Id.* at 667.

140 *See id.*

141 *Id.*

142 *Id.* (emphasis added).

143 *Id* at 668. The specific language in the Handbook is particularly relevant here:

> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior.

Id.

and deed, and "*defends those who are targets of insults.*"[144] Stevens concluded that "[i]t is plain as the light of day" that neither of these principles said anything about homosexuality.[145] To be sure, BSA's published guidance on the subject of sexual matters instructed boys to go to their parents, teachers, or religious leaders for those sorts of questions.[146] The Scoutmasters were, literally, the last individuals that the boys were encouraged to ask, and those leaders were told that they were not to instruct scouts in the subject of sex because "it is not construed to be Scouting's proper area."[147] So far, it appeared to Justice Stevens that the Boy Scouts had *no* shared values or "common moral stance on homosexuality."[148]

But, indeed, there were even more factual nails for Stevens to pound into BSA's argumentative coffin. BSA had promulgated a position statement in 1978 that was circulated only among the members of the national Executive Committee.[149] This statement stated that homosexuality was not considered "appropriate" in Scouting, and that BSA would not knowingly employ any gays;[150] however, if there was ever a law passed prohibiting discrimination against homosexuals (as in New Jersey's LAD, for example), BSA would comply with that law.[151] Stevens pointed to four aspects of this policy statement to counter BSA's argument that homophobia was a value shared among its millions of members.[152] First, the statement simply adopted an exclusionary membership policy, which "has never been considered sufficient, by itself, to prevail on a right to associate claim."[153] Second, the policy was never publicly expressed—BSA secretly maintained an exclusionary membership policy while its outwardly-expressed public policy remained one of tolerance and acceptance.[154] Third, BSA's position assumed that membership in its group was a privilege; however, because the New Jersey Supreme Court found that Boy Scouts was a "public accommodation" under that state's LAD, membership in the multi-

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144 *Id.* (emphasis added).

145 *Id.*

146 *Id.* at 669-70.

147 *Id.*

148 *Id.*

149 *See id.* at 672.

150 *Id.*

151 *See id.* Compliance with such a law would be consistent with a scout's duty to be "obedient" and "obey the laws," even if he thinks they are unfair. *Id.* at 672-73.

152 *See id.* at 672.

153 *Id.*

154 *Id.* Stevens remarked that "[i]n this respect, BSA's claim [of expressive association] is even weaker than those we have rejected in the past." *Id.*

million member Scouts was a right.[155] Finally, the statement simply said that homosexuality was not "appropriate," without making any "effort to connect that statement to a shared goal or expressive activity of the Boy Scouts."[156]

Justice Stevens criticized the majority's erroneous reliance on four other policy statements promulgated by BSA, all of which were written and issued *after* the organization revoked Dale's membership.[157] The post-hoc nature of these statements negated their legal relevance.[158] Moreover, the statements were inconsistent, and therefore did not meet Stevens's test that "[a]t a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."[159] As a result, Stevens found "BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities" fatal to BSA's claim of expressive association.[160]

Moving on to attack the majority opinion on legal grounds, Justice Stevens began by stating that the right to *associate* does not mean an unequivocal right to *discriminate* in the selection of associates.[161] After giving examples of other cases in which the Court had rejected assertions of this right by organizations with discriminatory membership policies,[162] Stevens pointed out that the Court has "never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."[163] In fact, "invidious private discrimination may be characterized as a form of exercising

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155 *See id.* at 672-73. Here, Stevens suggested that the "appropriate way for BSA to preserve its unpublished exclusionary policy would include an open and forthright attempt to seek an amendment of New Jersey's statute." *Id.* at 673. This would be consistent with scouting's tenet that "[i]f he [(a scout)] thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them." *Id.*

156 *Id.* "Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not 'appropriate' appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA." *Id.*

157 *See id.* James Dale's membership was revoked in 1990, and he brought suit in 1992. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1205 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000). In the meantime, BSA promulgated four position statements in the years 1991-93, largely in response to pending or anticipated litigation. *See Dale*, 530 U.S. at 673-74; *Dale*, 734 A.2d at 1205 n.4.

158 *See Dale*, 530 U.S. at 674 (Stevens, J., dissenting).

159 *Id.* at 676. The statements were contradictory in that those issued in 1991-92 stated that homosexuality was inconsistent with the Scout requirement that boys be "morally straight" and "clean." *Id.* In 1993, however, BSA abandoned that attempt to link its policy to its central tenets; instead, it adopted the position that its members preferred to exclude homosexuals because they could not be proper role models. *See id.* at 676-77.

160 *Id.* at 677.

161 *Id.* at 678 (citing New York State Club Ass'n., Inc. v. City of New York, 487 U.S. 1, 13 (1988)).

162 *See id.*

163 *Id.*

freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[164]

Then, after examining the precedent set by the *Roberts* trilogy of cases, Stevens argued that the majority was also wrong in its application of the *Roberts* rule.[165] According to Stevens, *Roberts* set three limitations on a group's ability to prevail on a claim of expressive association in contravention of a state's anti-discrimination law: (1) "it is not enough simply to engage in *some kind* of expressive activity;" (2) "it is not enough to adopt an openly avowed exclusionary membership policy;" and (3) "it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy."[166] Thus, the test from *Roberts* is whether the state law "'imposed any *serious burdens*' on the group's 'collective effort on behalf of [its] *shared goals*.'"[167]

Applying the *Roberts* test to the facts of *Dale*, Stevens concluded that BSA "has *no shared goal* of disapproving of homosexuality," not to mention that such a view (if it existed) was never taught to scouts.[168] Moreover, BSA never adopted a *clear position* on homosexuality.[169] Thus, New Jersey's LAD could not impose any "serious burden" upon the "shared goals" of BSA "if the group itself is unable to identify its own stance with any clarity."[170]

It is crucial to point out that the majority opinion avoided the *entire* foregoing analysis because it simply deferred to BSA's assertions, made during litigation, that homophobia was not only a shared value among its *millions* of members, but that it was also a core expressive purpose for which the Boy Scouts was formed.[171] Additionally, the Court deferred to BSA's assertion that James Dale's *mere presence* in Boy Scouts would impair that expression.[172] According to the majority, "[I]t is not the role of the courts to reject a group's

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164 *Id.* at 679 n.11 (quoting Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)).

165 *See id.* at 678-81.

166 *Id.* at 682-83.

167 *Id.* at 683 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622, 626 (1984)). Here, the Court should properly inquire as to whether compliance with the state law would significantly affect protected speech, or require the group to abandon its basic goals. *See id.* (citations omitted). Moreover, the group must show that it was organized for specific expressive purposes, and that the group's expression of its views is dependent upon confining its membership (and excluding certain classes of people). *See id.* (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958)).

168 *Id.* at 684 (emphasis added).

169 *See id.* at 685.

170 *Id.*

171 *See id.* at 685-86. The majority believed that so long as the record contained "written evidence" to support BSA's bare assertion, it "need not inquire further" because the Court "cannot doubt" the truth of that assertion. *Id.* at 651-53.

172 *See id.* at 653.

expressed values because they disagree with those values or find them internally inconsistent."[173] However, Stevens argued, rightly so, that courts are to do *just that* when internally inconsistent views are used to bolster a claim of freedom of association in direct contravention of a state's antidiscrimination law.[174] As for the Court's duty to give deference to the Boy Scouts's assertions, Stevens propounded:

> This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. 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." It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims.[175]

The majority's form of "independent review" blurs the line between legitimate exercises of the right to associate and "sham claims that are simply attempts to insulate nonexpressive private discrimination."[176] Affording litigants such as the Boy Scouts a shield from judicial scrutiny poses a serious risk of rendering anti-discrimination legislation a nullity.[177] In short, the majority of the Court in *Dale* made a grievous error in failing to conduct a truly independent inquiry, and has "turn[ed] the right to associate into a free pass out of antidiscrimination laws."[178]

As for BSA's First Amendment freedom of speech claim, Justice Stevens acknowledged that BSA has a right to exclude messages about homosexu-

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173 *Id.* at 651.

174 *See id.* at 686 (Stevens, J., dissenting). Stevens argued:

> An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message . . . and whether that message . . . is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture.

Id.

175 *Id.*

176 *Id.* at 687.

177 *See id.* at 687-88. Justice Stevens quoted from Justice Frankfurter's concurrence in Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945): "Certainly the insistence by individuals on their private prejudices . . . ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." *Dale*, 530 U.S. at 687.

178 *Dale*, 530 U.S. at 688 (Stevens, J., dissenting).

ality from the values that it teaches to scouts.[179] Moreover, James Dale's right to advocate his beliefs in public or private forums does not include a right to advocate those ideas when he is working as a Scoutmaster.[180] But BSA's right to choose "what not to say" goes to free speech, and not to the right to associate.[181] Thus, BSA can choose not to speak to its scouts on the subject of homosexuality, but it *cannot* exclude James Dale from membership in the organization based solely on his *status* as a homosexual unless it can prove that Dale would advocate homosexuality while working for BSA or otherwise act in such a way to use his position in BSA to force the Scouts to proclaim a message it did not wish to send.[182]

Although the majority in *Dale* did not endorse the argument, BSA believed that Dale would use his position as a bully pulpit to advocate his views on homosexuality, and therefore his inclusion would force BSA to send an "immoral" message to its scouts.[183] The simple fact is that BSA had no proof that Dale had, or ever would, do such a thing.[184] All Scoutmasters were instructed that sexual issues were not their "proper area," and there was "no evidence that Dale had any intention of violating this rule."[185] If he did not comply with the rule, then BSA could rightfully revoke his membership.[186] There was no basis to assume that a homosexual could not comply with BSA's policies.[187]

The majority did, however, accept BSA's argument that Dale's *mere presence* in BSA would force the Scouts to convey a message about homosexuality.[188] To reach this conclusion, the Court relied solely on *Hurley*, which, ac-

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179 *Id.*

180 *Id.*

181 *Id.* The right to choose "what not to say" comes from Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995). The *Hurley* Court explicitly pointed out the distinction between free speech and right to associate claims. *See* 515 U.S. at 564-65, 580-81.

182 BSA itself conceded that its rights were "not implicated *unless* a prospective leader *presents himself* as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law." *Dale*, 530 U.S. at 691-92 (Stevens, J., dissenting) (citation omitted).

183 *See id.* at 692.

184 *See id.* at 689-93.

185 *Id.* at 690.

186 *Id.* at 691. Stevens pointed out that BSA "relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization. Of course, a disobedient member who flouts BSA's policy may be expelled." *Id.*

187 *See id.* Justice Stevens argued that a heterosexual who was not homophobic could just as well speak out on his views of acceptance and tolerance as pertaining to homosexuals. *See id.* at 691 n.19.

188 *See id.* at 692. The majority held that the presence of an avowed homosexual in an Assistant Scoutmaster's uniform sends a distinct message "that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior;" accordingly, BSA was entitled to exclude that

cording to Justice Stevens, was erroneous for several reasons.[189] First, the parade at issue in *Hurley* was an "inherently expressive undertaking," and the gay group's participation in the parade "'would likely be perceived' as the parade organizers' own speech—or at least as a view which they approved—because of a parade organizer's customary control over who marches in the parade."[190] Second, Dale's inclusion in BSA was nothing like the case in *Hurley* because "[h]is participation sends no cognizable message."[191] Stevens argued that Dale's "mere act of joining the Boy Scouts . . . does not constitute an instance of symbolic speech under the First Amendment."[192]

> Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.[193]

Essentially, the majority seemed to believe, as did BSA, that James Dale's gay status amounted to a permanently affixed "homosexual" label—a label that "even though unseen, communicates a message that permits his exclusion wherever he goes. *His openness is the sole and sufficient justification for his ostracism.*"[194]

A third difference between *Dale* and *Hurley* is that *Hurley* involved the parade organizers' right to determine the content of their message at a particular time and place.[195] A claim of expressive *association*, on the other hand, "normally involves the avowal and advocacy of a consistent position on some issue over time," and therefore receives a different kind of scrutiny.[196] Finally, Justice Stevens found that the notion that an organization that has welcomed over 87

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message. *Id.* at 692-93.

189 *See id.* at 693-94.

190 *Id.* at 693.

191 *Id.* at 694. "Unlike GLIB [(the gay group in *Hurley*)], Dale did not carry a banner or sign . . . and he expressed no intent to send any message." *Id.* at 695.

192 *Id.*

193 *Id.* at 695.

194 *Id.* at 696 (emphasis added). Stevens continued: "Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority." *Id.* The counsel for Boy Scouts even stated at oral argument that Dale "put a banner around his neck . . . [and] created a reputation. . . . He can't take that banner off." *Id.*

195 *Id.*

196 *Id.*

million members endorses the views of each individual in the organization is "simply mind boggling."[197]

Though Justice Stevens attacked the majority's decision on many grounds, the bottom line, as reiterated in Justice Souter's separate dissent, was simple: the Boy Scouts failed to make 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."[198] According to Justice Souter, to require less than a clear and unequivocal position advocated over time "would convert the right of expressive association into an easy trump of any antidiscrimination law."[199]

V. THE PRECEDENTIAL IMPLICATIONS OF *DALE*

Dale is a landmark in a newly emerging line of constitutional jurisprudence. The cases in which the Court has considered homosexuality within the context of the Constitution are few—the two most notable are *Bowers v. Hardwick*[200] and *Romer v. Evans*.[201] So, what effect will *Dale* have on the future development of this area of the law? The precedent set by *Dale* will likely be felt on three fronts.

A. The Court's Refusal to Recognize the Elimination of Homophobic Discrimination as a Compelling State Interest

The most significant precedent set by *Dale* is that the Court refused to find that the elimination of invidious discrimination against homosexuals may be a compelling state interest. Because the Court found that New Jersey's LAD had a direct and immediate effect on BSA's protected right of association under the First Amendment, the state law was subject to strict scrutiny.[202] As a precedent, this means that states cannot defend their public accommodations laws

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197 *Id.* at 697.

198 *Id.* at 701 (Souter, J., dissenting).

199 *Id.* at 701-02.

200 478 U.S. 186 (1986). In *Bowers*, a state statute making sodomy illegal was held to be constitutional because the Fourteenth Amendment did not create a fundamental right to engage in sodomy, even if consensual, and even if done in the privacy of one's own home. *Id.*

201 517 U.S. 620 (1996). There, a state passed a constitutional amendment which prohibited the legislature or any other governmental unit within the state from enacting laws designed to protect homosexuals from discrimination. *See id.* at 623-24. The Supreme Court held that the amendment violated the Equal Protection Clause of the U.S. Constitution because the classification based on sexual orientation was found to be unrelated to any legitimate state interest. *See id.* at 632.

202 *See Dale*, 530 U.S. at 659. *See also supra* text accompanying notes 108-110.

against constitutional challenges by claiming that protecting persons from invidious discrimination because of their sexual orientation is a compelling state interest.[203] A private organization's First Amendment freedoms, in particular that of expressive association, can be overridden only if a state can demonstrate a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved by any other less restrictive means.[204] This is an extremely high hurdle, and one that states are unlikely to overcome in their attempts to protect homosexuals from discrimination, so long as the Court is unwilling to recognize that states may have a compelling interest in enacting laws that would protect gays from the devastating effects of hatred for the sake of hatred. The result is that private organizations now seem to have an "easy trump" of anti-discrimination laws:[205] the Supreme Court has, in effect, created a "constitutional shield" for invidious discrimination against gays.[206]

B. The Effect of Dale *on Public Accommodations Laws*

A second effect of the precedent set by *Dale* is that states will no doubt question the efficacy of broadening the scope of their public accommodations laws to include traditionally non-suspect classes. After all, what is the benefit of enacting a law that cannot be applied in order to accomplish its purpose? "At least nine States, the District of Columbia [and] 74 cities . . . have enacted laws that prohibit sexual orientation discrimination in public accommodations."[207]

> A ruling allowing an organization of [BSA's] scope and with this level of engagement with government to discriminate will severely compromise the ability of the State to enforce its civil rights laws in contexts involving the protection of not just sexual orientation, but every class of our most vulnerable citizens.[208]

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[203] Contrast sexual orientation with race and gender, classifications which receive heightened protections. A state does have a compelling interest in protecting persons within those classifications from invidious discrimination. Of course, the argument is that race and gender are immutable characteristics, while sexual orientation is not. Or is it? An examination of this question exceeds the scope of this note; however, it is probable that the members of the majority in *Dale* believe that sexual orientation is *not* an immutable characteristic. *See Dale*, 530 U.S. at 656 n.2.

[204] *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[205] *Dale*, 530 U.S. at 702 (Souter, J., dissenting).

[206] *Id.* at 700 (Stevens, J., dissenting).

[207] Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 13, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

[208] Brief of Amicus Curiae State of New Jersey in Support of Respondent at 1, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

The result of these concerns will be that states which would have otherwise chosen to amend their public accommodations laws to prohibit discrimination against homosexuals may not do so in light of *Dale*.[209]

C. Dale *as an Impediment to Desirable Social Change*

Dale only "symbolizes the latest legal battleground in what Justice Antonin Scalia once called the *Kulturkampf* that is being waged in the larger society over homosexual rights."[210] Past experience tells us that changes in social thinking often spark changes in legal thinking. Perhaps it can be argued that it is fitting that the Court would wait, and take its cue from society at large, for the proper time to acknowledge the common humanity shared by all Americans, including homosexuals. However, there have been occasions when the Court was brave enough to provide the impetus for social change, such as in the landmark case of *Brown v. Board of Education*,[211] which was met with enormous resistance in the racially-divided South. Judges, just like ordinary citizens, find comfort in the status quo. Change comes slowly, and often only after overcoming great opposition. Sexual orientation is no exception to the rule. It is true that society is gradually coming to accept homosexuality as a "legitimate form of behavior"[212] as young generations are taught the values of diversity and acceptance.[213] In response, many states have taken action to protect gays from the harms caused by homophobic discrimination. It remains to be seen how long the Court will wait to acknowledge that homosexuals are the targets of invidious discrimination, and therefore deserve the protections that more and more states see fit to provide. Regardless of which side you are on, this controversial issue will continue to be played out on all fronts—societal, political, and judicial.

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[209] Of course, not all "public accommodations" can show either a protected expressive association purpose or an intimate association right, which means that not all such organizations would have valid grounds for challenging a state's public accommodations law.

[210] Baker, *supra* note 13, at 364 (referring to Justice Scalia's dissent in Romer v. Evans, 517 U.S. 620, 636 (1996), in which he described the battle being waged in society over homosexual rights as a *Kulturkampf*, German for "culture war").

[211] 347 U.S. 483 (1954).

[212] *Dale*, 530 U.S. 640, 651 (2000). Of course, whether being gay is properly called a "behavior" is the subject of much debate, and exceeds the scope of this note. Suffice it to say that the majority in *Dale* would likely classify homosexuality as a behavioral "choice," while the dissenters would probably argue that sexual orientation has more biological foundations.

[213] As a continuing sign of homophobic intolerance by "older" generations, consider the Defense of Marriage Act, passed in 1996. The Act provides that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C (2001).

VI. CONCLUSION: THE FUTURE OF *DALE*

So, what is the future of *Dale*? In a word: precarious. The Court's decision in this case was 5-4, with a dissent by Justice Stevens that was both vigorous and persuasive.[214] Given that two Justices on the current Court, namely Justices Kennedy and O'Connor, have a tendency to be the "swing" votes, it is possible that they could be persuaded to join the side of the "liberal minority" when they are again confronted with the issue of discrimination against homosexuals.[215] It is also foreseeable that a shift in the composition of the Supreme Court in the coming years will result in a more liberal majority that may overrule the *Dale* decision, as has happened in the past with such decisions as *Plessy v. Ferguson*[216] and *Goesaert v. Cleary*.[217] Moreover, the tide of social change will only make the idea of civil rights for homosexuals more socially acceptable, as it did with African-Americans and women before. As Justice Stevens observed, "[I]nteraction with real people [over time], rather than mere adherence to traditional ways of thinking about members of unfamiliar classes" has a tendency to modify the prevailing social opinion.[218] The courts tend to respond in kind to the changing social tide, even if they do so slowly or reluctantly. Finally, the high number of amici curiae briefs in this case indicate that myriad groups are concerned about and have a stake in this issue.[219] This concern is due to the ongoing prevalence of prejudice against gays, which continues to cause "serious and

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214 *See Dale*, 530 U.S. at 663-700.

215 It is generally acknowledged that Chief Justice Rehnquist, along with Justices Scalia and Thomas are the "conservative" members of the Court. They are often, but not always, joined by Justices Kennedy and O'Connor. Justices Stevens, Souter, Breyer, and Ginsberg tend to compose the "liberal minority." It was Justice Kennedy who wrote the opinion in Romer v. Evans, 517 U.S. 620 (1996), which, taken in light of his position in *Dale*, is some evidence that he may be torn on this issue. Perhaps Kennedy might be persuaded that counter-homophobic legislation serves at least an important enough purpose to off-balance a weakly-based intimate association claim or an expressive association claim where homophobic expression is at best a weak part of a group's expressive purposes. Of course, in *Dale*, he must have concurred in the majority's finding that anti-homosexual propaganda was an important part of BSA's expressive purposes, a claim that Justice Stevens found preposterous.

216 163 U.S. 537 (1896). *Plessy's* "separate but equal" doctrine was later overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954).

217 335 U.S. 464 (1948) (applying "mere rationality" review to a classification based on gender). *Goesaert* was later explicitly disapproved by the Supreme Court in Craig v. Boren, 429 U.S. 190 (1976) (formulating a new "intermediate" level of scrutiny for gender-based classifications).

218 *Dale*, 530 U.S. at 699 (Stevens, J., dissenting).

219 Over thirty amici briefs were submitted to the Court in this case. Those groups supporting BSA were primarily religious, pro-family, and legal groups. Curiae supporting Dale included cities, states, and school districts, the ACLU, NAACP, and other civil rights groups, and the ABA and other legal organizations.

tangible harm" to countless homosexuals.[220] "That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."[221] Indeed, when this question is again presented to the Court, Justice Brandeis's prudent advice may finally be heeded: "[W]e must be ever on our guard, lest we erect our prejudices into legal principles."[222]

Erica L. Stringer[*]

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220 *Dale*, 530 U.S. at 700 (Stevens, J., dissenting).

221 *Id.*

222 *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

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