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DALE V. BOY SCOUTS OF AMERICA: NEW JERSEY'S LAW AGAINST DISCRIMINATION WEIGHS THE BALANCE BETWEEN THE FIRST AMENDMENT AND THE STATE'S COMPELLING INTEREST IN ERADICATING DISCRIMINATION

INTRODUCTION

"We must love one another with pure heart fervently. We must delight in each other, make each other's condition our own, rejoice together, mourn together, and suffer together. We must . . . be knit together as one."¹ The first governor of the Massachusetts Bay Colony spoke those words in 1630 on the eve of his arrival in the New World.² His words still ring true today, as human nature compels us to associate into groups, whether they be labor unions, church groups, or local PTAs, perhaps not to survive in the wilderness of a new, unexplored land, but to help us develop cultural identities and to make our lives easier and more fulfilling.³ But what happens to this sense of well-being when an individual is excluded from a certain group or when a certain group is forced by state anti-discrimination law to accept members?

Today, legislatures have enacted laws expressing society's intolerance of discrimination based on race, religion, or sex in areas such as employment and public accommodations. For instance, state and federal public accommodations laws clearly prohibit a hotel from refusing to lodge people just because they are African-American.⁴ Conversely, people are free to exclude

1. AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 2 (1995) (quoting John Winthrop's speech, "A Model of Christian Clarity" (1630)), reprinted in *PURITAN POLITICAL IDEAS* 75 (Edmund S. Morgan, ed., Bobbs-Merrill 1965).

2. *See id.*

3. *See* Lois M. McKenna, Note, *Freedom of Association or Gender Discrimination?* *New York State Club Association v. City of New York*, 38 AM. U.L. REV. 1061, 1089 (1989) (stating that associations provide support and comfort); Marian L. Zabler, Note, *When is a Private Club Not a Private Club: The Scope of the Rights of Private Clubs After New York State Club Association v. City of New York*, 55 BROOK. L. REV. 327 (1989) (stating that associations provide "individuals with a sense of identity, as well as a feeling of acceptance and belonging").

4. *See* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 260-61 (1964) (upholding

others from their homes for Sunday dinner because the state cannot constitutionally force people to open their private homes to people of all races or religions.⁵ Between these two extremes, however, people disagree passionately about whether certain activities are private or public and hence whether participants may or may not exclude others. Generally, private clubs and organizations that form to promote the welfare of a specific group are unlikely to welcome and may actively exclude outsiders who do not "fit in" with the existing members.⁶ In enforcing a state public accommodation law forbidding discrimination on the basis of race, religion, gender, and often sexual orientation, a court must determine whether a club or organization is a public accommodation or a private club that the law cannot prohibit from discriminating.⁷ If the court determines that the club is a public accommodation, the club may raise a federal constitutional challenge claiming that the state law substantially infringes on the club members' freedom of association.⁸

These two issues are central in a case that decides whether the Boy Scouts of America (BSA) is a place of public accommodation,⁹ and if it is, whether a state law forcing the BSA to accept diverse individuals as members and leaders infringes on the organization's freedom of association.

as constitutional federal public accommodations statute, Title II of the Civil Rights Act of 1964).

5. See Andrew H. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. CIV. RTS. L.J. 111, 120 (1997) (stating that the constitution would absolutely protect this type of arrangement from the public accommodation law as an intimate association).

6. See M. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 228 (2d ed. rev. 1981) (noting that "[i]t is the action [denying membership] of the others in their group which represents the important threat" to others "untrammelled freedom of association").

7. See Julie A. Moegenburg, Comment, *Freedom of Association and the Private Club: The Installation of a "Threshold" Test to Legitimize Private Club Status in the Public Eye*, 72 MARQ. L. REV. 403, 419 (1989) (noting that there is no single test under which courts determine whether an organization is a place of public accommodation).

8. 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).

9. See *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, (Kan. 1995); *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998).

*Dale v. Boy Scouts of America*¹⁰ epitomizes the tension between the government's interest in eradicating discrimination and preserving each individual's constitutionally protected right to freedom of association. In *Dale*, the Appellate Division of the New Jersey Superior Court held that because the BSA is a place of public accommodation under the New Jersey Law Against Discrimination (NJLAD),¹¹ the BSA violated the NJLAD.¹² Furthermore, the court held that enforcing the NJLAD to prohibit the BSA from discriminating on the basis of sexual orientation did not violate BSA members' freedom of association.¹³ New Jersey's Supreme Court upheld the appellate court's decision, the BSA appealed, and the U.S. Supreme Court granted certiorari.¹⁴

This Comment examines the New Jersey appellate court's holding in *Dale*. Part I describes the facts of the case. Part II outlines United States Supreme Court decisions that developed the implied constitutional right of freedom of expressive association; these cases could influence the Court's analysis of the *Dale* decisions. Part III examines the history of the duty to serve the public without discriminating as it relates to public accommodation statutes and explores the purpose and role of the NJLAD in protecting an individual's right to join an association. Part IV first analyzes the appellate court's decision finding the BSA to be a place of public accommodation; it then analyzes the court's decision of the First Amendment free association issue in light of established United States Supreme Court precedent. Finally, Part V discusses the New Jersey Supreme Court's brief holding affirming the law's constitutionality as applied to the BSA.

I. FACTS OF THE CASE

James Dale joined the Cub Scouts at age eight.¹⁵ As an active member, Dale earned thirty merit badges and achieved the

10. 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

11. *See id.*; N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999).

12. *See Dale*, 706 A.2d at 280.

13. *See id.* at 293.

14. *See* 734 A.2d 1196 (N.J. 1999); *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

15. *See Dale*, 706 A.2d at 275.

highest rank possible, that of Eagle Scout.¹⁶ Consequently, the Monmouth Council (the Council) chose Dale as a delegate to the National Boy Scout Jamboree in 1985.¹⁷ In 1988, the Council approved Dale's application for adult membership, and Dale served as an Assistant Scoutmaster until 1990 when he received a letter from the Council revoking his membership.¹⁸ The letter requested that Dale "sever any relations that [he] may have with the Boy Scouts of America" and noted that service as a volunteer leader in the BSA is a "privilege and is not automatically granted to everyone who applies."¹⁹

When Dale inquired why his membership had been revoked,²⁰ the BSA informed him that "[t]he grounds for [the] membership revocation [were] the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals" and further explained that the BSA had learned of Dale's homosexuality through a newspaper article.²¹ The article identified Dale as the co-president of a university lesbian-gay alliance and quoted him as saying that he had admitted his homosexuality during his second year of college.²² The Council told Dale that "by publicly avowing" his homosexuality, he had failed to live by the Scout Law, and this conduct constituted grounds for revoking his membership.²³

Dale filed suit in the New Jersey Superior Court, alleging that the Council had violated the NJLAD and seeking his reinstatement in the BSA as both a member and a volunteer leader.²⁴ The court granted the Council's motion for summary judgment, holding that Dale "had no cause of action under the [NJ]LAD because the BSA [is] not a 'place of public accommodation'" under the NJLAD and because the BSA qualified for the NJLAD's exclusion for "any institution . . . which is in its nature distinctly private. . . ."²⁵ The court further

16. *See id.*

17. *See id.*

18. *See id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. *See id.*

23. *See id.*

24. *See id.* at 276-77.

25. *Id.* at 277 (quoting *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Ch. Div. 1995)).

held that even if the BSA was a place of public accommodation, enforcing the NJLAD in this situation would violate BSA members' First Amendment freedom of expressive association.²⁶ The court stated that because the BSA believed that homosexual conduct was morally wrong, the "presence of a publicly avowed active homosexual as an adult leader of boy scouts [would be] absolutely antithetical to the purpose of Scouting."²⁷ Dale filed an appeal, and on March 2, 1998, the appellate division reversed the lower court.²⁸ It found that the BSA is a place of public accommodation under the NJLAD, the BSA does not fit within the "distinctly private" exclusion, and enforcement of the NJLAD to compel the BSA to accept Dale as an adult leader is not an unconstitutional infringement on BSA members' freedom of association.²⁹

II. THE UNITED STATES SUPREME COURT'S DEVELOPMENT OF THE IMPLIED RIGHT OF FREEDOM OF EXPRESSIVE ASSOCIATION

The U.S. Supreme Court granted certiorari in *Dale* on January 14, 2000.³⁰ It has already created a framework for deciding cases that involve the implied right of expressive association.³¹ The following cases could inform the Court's analysis of the issues in *Dale*.

A. NAACP v. Alabama ex rel Patterson

The First Amendment to the United States Constitution does not expressly guarantee the right to association.³² In *NAACP v. Alabama ex rel Patterson*,³³ however, the United States Supreme Court held that the freedom to associate is necessary

26. *See id.*

27. *Id.* at 277.

28. *See id.* at 270.

29. *See id.* at 274.

30. *See* ___ U.S. ___, 120 S. Ct. 865 (2000).

31. *See* *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958).

32. *See* U.S. CONST. amend. I; *see also Dale*, 706 A.2d at 285; ABERNATHY, *supra* note 6, at 267 (noting that after *NAACP v. Alabama ex rel Patterson*, the Court widely used the right of association to expand the reach of the First Amendment).

33. 357 U.S. 449 (1958).

for groups of people to effectively express their “public and private points of view, particularly controversial ones.”³⁴ Therefore, state action that curtails “the freedom to associate is subject to the closest scrutiny.”³⁵ The Court further noted 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.”³⁶

B. *Roberts v. United States Jaycees*

Patterson did not establish freedom of association as an absolute right, as the court noted in *Roberts v. United States Jaycees*.³⁷ *Roberts* involved the State of Minnesota, which wanted to end the exclusion of women from private clubs by enforcing anti-discrimination legislation, and the members of the United States Jaycees (Jaycees), who desired to associate only with other men.³⁸ The Jaycees is a national organization that, at the time, had 295,000 members and restricted full membership to men between the ages of eighteen and thirty-five.³⁹ The organization allowed women and older men to join only as associate members with no rights to vote, run for office, or win achievement awards.⁴⁰ When the Minnesota Department of Human Rights (MDHR) designated the Jaycees as a place of public accommodation under the Minnesota Human Rights Act (MHRA),⁴¹ the Jaycees challenged the constitutionality of enforcing the law in a manner that forced the Jaycees to stop discriminating against prospective members on the basis of sex.⁴²

34. *Id.* at 460.

35. *Id.* at 461.

36. *Id.* at 460.

37. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (holding that “[i]nfringements on [freedom of association] may be justified 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”).

38. *See id.* at 612.

39. *See id.* at 613.

40. *See id.*; Ann Jameson, Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1056 (1985).

41. MINN. STAT. § 363.03 (1998).

42. *See Roberts*, 468 U.S. at 615-16.

The Court first noted that two forms of freedom of association receive constitutional protection: the freedom of intimate association and the freedom of expressive association.⁴³ The freedom of intimate association is implicated by “intimate human relationships,”⁴⁴ such as “marriage . . . and cohabitation with one’s relatives,”⁴⁵ which “are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”⁴⁶ As framed by the Court, freedom of intimate association did not apply to the Jaycees because “the Jaycees are a large, unselective group whose activities involve the participation of outsiders . . . and lack the necessary attributes of familial relationships”⁴⁷

Conversely, the freedom of expressive association is a “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁴⁸ The government abridges a group’s freedom of expressive association by compelling it to admit members against its will because this interference “may impair the ability of the original members to express only those views that brought them together.”⁴⁹

The Jaycees argued that by forcing it to accept women, the state was forcing the group to change its message, which violated its right to expressive association.⁵⁰ The Jaycees suggested that women have “a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations,” which would be inconsistent with the message that the men wished to communicate.⁵¹ The Court weighed the Jaycees’s freedom of expressive association against Minnesota’s compelling interest in ending discrimination

43. *See id.* at 617-18.

44. *Id.* at 617.

45. *Id.* at 619.

46. *Id.* at 620.

47. Jameson, *supra* note 40, at 1074. *See* Perlman, *supra* note 5, at 121 (explaining that the smaller and more selective a group becomes, the less likely that group will be able to deny any social resources to individuals who seek entry to the group, and therefore the more likely that the group will be protected by the freedom of intimate association).

48. *Roberts*, 468 U.S. at 622.

49. *Id.* at 623.

50. *See id.* at 627-28.

51. *Id.*

against women and found that “[i]nfringements on [the Jaycees’] right may be justified 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.”⁵² The Court found that the MHRA was not designed to suppress free speech and that enforcing the law to provide Minnesota’s citizens with equal access to goods and privileges was clearly a compelling state interest.⁵³ Furthermore, the Court recognized that the Jaycees had no evidence, other than stereotypical generalizations, that women’s opinions on certain issues actually differ from those of men; the Court refused to base legal decisions on such generalizations.⁵⁴ Finding that the forced inclusion of women would not alter the Jaycees’s message, the Court held the MHRA constitutional as applied to the Jaycees.⁵⁵

C. Board of Directors of Rotary International v. Rotary Club of Duarte

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,⁵⁶ the Supreme Court upheld California’s Unruh Civil Rights Act,⁵⁷ which prohibited clubs from excluding women on the basis of sex.⁵⁸ Rotary International (International), a nonprofit service organization, consists of local Rotary Clubs composed of business leaders and professionals.⁵⁹ International’s membership rules did not allow local clubs to admit women because members of the organization believed that excluding women promoted fellowship among the male members and allowed the clubs to operate in foreign countries where women are believed to be unequal to men.⁶⁰ However, the rules did allow women to attend the meetings and to form their own auxiliary groups.⁶¹

52. *Id.* at 623.

53. *See id.* at 626.

54. *See id.* at 628.

55. *See id.* at 628-29.

56. 481 U.S. 537 (1987).

57. CAL. CIV. CODE § 51 (West 1993 & Supp. 1999).

58. *See Rotary Int’l*, 481 U.S. at 549.

59. *See id.* at 539-40.

60. *See id.* at 541.

61. *See id.*

When the Rotary Club of Duarte (Duarte) admitted three women members, International revoked the club's charter and terminated its membership.⁶² Duarte filed suit, claiming that International had violated the Unruh Act.⁶³ On rehearing, the appeals court found that the Rotary Club was a "business establishment" and was therefore subject to the Act.⁶⁴ On appeal to the United States Supreme Court, International alleged that, as applied, the Unruh Act violated its constitutionally protected right of association.⁶⁵

The Supreme Court analyzed International's claim under the guidelines that it set forth in *Roberts*.⁶⁶ First, the Court held that the Act did not violate the club's freedom of intimate expression because the relationship between the club's members was not intimate enough to warrant constitutional protection.⁶⁷ The Court based this decision on the Rotary Club's "size, purpose, [lack of] selectivity, and [the fact that] others [were not] excluded from critical aspects of the relationship."⁶⁸ Second, the Court held that the Act did not violate International's freedom of expressive association because the "Unruh Act does not require the clubs to abandon or alter any of [their service] activities" or their "basic goals of humanitarian service, high ethical standards . . . , good will, and peace."⁶⁹

D. New York State Club Ass'n v. City of New York

In *New York State Club Ass'n v. City of New York*,⁷⁰ the Supreme Court held that the application of New York City's

62. *See id.*

63. *See id.*

64. *See id.* at 542-43; *see also* *Rotary Club of Duarte v. Board of Dirs. of Rotary Int'l*, 224 Cal. Rptr. 213 (Cal. Ct. App. 1986).

65. *See Rotary Int'l*, 481 U.S. at 543.

66. *See id.* at 544.

67. *See id.* at 546.

68. *Id.* The Court noted the following: Rotary Clubs can have an unlimited number of members; the purpose of the club is to be as inclusive as possible in order to properly represent the community; and "[m]embers are encouraged to invite business associates and competitors to meetings . . . [and] to seek coverage of their meetings and activities in local newspapers." *Id.* at 547.

69. *Id.* at 548-49 (noting that one of International's goals was to have a representative cross-section of the community, the Court recognized that admitting women would actually further this goal as well as increase the group's "capacity for service").

70. 487 U.S. 1 (1988).

Human Rights Law (NYCHRL)⁷¹ to private organizations did not violate the organizations' freedom of expressive association.⁷² In 1984, the New York State Club Association (NYSCA) filed suit in state court, alleging that the NYCHRL violated the freedom of association of its members.⁷³ The trial court upheld the law, and the intermediate appellate court and court of appeals both affirmed, finding that the city's compelling interest in ending discrimination outweighed any violation of the club members' associational rights.⁷⁴ The Court further found that the law used the "least restrictive means to achieve its ends because it interfere[d] with the policies . . . of private clubs only 'to the extent necessary to ensure that they d[id] not automatically exclude persons from membership . . . on account of invidious discrimination.'"⁷⁵

The Court reiterated that the freedom of association is not an absolute guarantee that "in every setting in which individuals exercise some discrimination in choosing associates, their selective process . . . is protected by the Constitution."⁷⁶ The Court stated that as long as the organization did not exclude members merely on the basis of a criteria prohibited by the NYCHRL, the organization was still free to exclude individuals "who [did] not share the views that the club's members [wished] to promote."⁷⁷ In this manner, the law acted in the least restrictive manner possible to end discrimination and therefore did not unconstitutionally infringe upon the members' associational rights.⁷⁸ However, the Court recognized the possibility that a group might demonstrate that it was formed primarily for an expressive purpose, such as advocating an anti-women agenda, which would be inherently inconsistent with

71. *See id.* at 5 n.1 (quoting N.Y. CITY ADMIN. CODE § 8-107(2)(1986)). "The [New York] Human Rights Law . . . makes it 'an unlawful discriminatory practice for any . . . place of public accommodation . . . because of the race, creed, color, national origin or sex of any person . . . to refuse, withhold from or deny . . . any of the accommodations, advantages, facilities or privileges thereof . . .'" *Id.*

72. *See id.* at 13.

73. *See id.* at 7.

74. *See id.*

75. *Id.* at 7-8 (quoting *New York State Club Ass'n v. City of New York*, 505 N.E.2d 915, 921 (1987)).

76. *Id.* at 13.

77. *Id.*

78. *See id.*

accepting women as members.⁷⁹ In such a case, the Court noted that the group might not “be able to advocate its desired viewpoints nearly as effectively [without confining] its membership to those who share the same sex” and indicated that, in such a situation, the group’s exclusion of certain individuals would be constitutionally protected.⁸⁰ However, the burden of establishing such a situation falls on the organization and requires the organization to show “a strong relationship between its expressive activities and its discriminatory practice.”⁸¹

E. The Positive and Negative Interests in Association

Critics have characterized the Court’s analysis of the constitutional limitations on public accommodation laws as inadequate because it fails to recognize the existence of both a positive and a negative interest in the freedom of association.⁸² These critics say that the Court erred in relying on the state’s compelling interest in providing access to goods and services to all persons as the sole justification for allowing states to pass public accommodation laws.⁸³ A positive interest in association exists because people need to associate in order to “flourish.”⁸⁴ This need counters the negative interest that exclusive groups have in controlling their membership.⁸⁵ Therefore, when balancing an association’s interest in exclusion against the state’s interest in providing equal access, the Court could provide a more persuasive rationale for upholding public

79. *See id.*

80. *Id.*; see also Brief of Amici Curiae American Civil Liberties Union and the American Civil Liberties Union of New Jersey for Dale at 21, Dale v. Boy Scouts of Am., 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) (No. A-2427-95T3) (arguing that under *New York State Club Ass’n*, “only an organization like the Ku Klux Klan, whose primary organizational purpose is to advocate racial separation and assert white superiority . . . can use associational freedom as an exemption from statutory non-discrimination requirements”).

81. Dale v. Boy Scouts of Am., 706 A.2d 270, 287 (N.J. Sup. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

82. *See* Perlman, *supra* note 5, at 112-13.

83. *See id.* at 114.

84. *See id.* at 117.

85. *See id.*

accommodation laws by considering the positive interest in associating.⁸⁶

III. THE HISTORY AND PURPOSE OF THE NEW JERSEY LAW AGAINST DISCRIMINATION

A. *The Origin of the Duty to Serve and the Construction of Early Public Accommodation Laws*

Before the enactment of state and federal public accommodation statutes, the common law imposed upon those engaged in "public employment" a duty to serve the public without discrimination.⁸⁷ For example, the common law imposed a duty on an innkeeper to accommodate all who came to the inn unless the inn was full.⁸⁸

Commentators and courts have advanced several theories regarding which activities the common law considered to be public employment.⁸⁹ One theory suggests that people dealing in necessary goods or services may not withhold those services without good reason.⁹⁰ Hence, the innkeeper who offers rooms for rent cannot refuse to serve the weary and needy traveler who has nowhere else to sleep.⁹¹ Another theory rests on the idea that public employment consists of those activities that received special licenses or exclusive privileges from the government to operate, such as railroads and other common carriers.⁹² A duty to serve the public accompanied the exclusive right to operate because customers who were arbitrarily denied access to goods or services could not go elsewhere.⁹³

86. *See id.* at 114.

87. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1305 (1996).

88. *See id.*

89. *See id.* at 1305-11 (discussing the theories that have been used by courts and authors to explain the origin of the common law duty to serve).

90. *See id.* at 1308.

91. *See id.* (citing *Rex v. Ivens*, 173 Eng. Rep. 94 (K.B. 1835) (holding that the innkeeper could not refuse to serve the traveler merely because of the late hour at which he called)).

92. *See id.* at 1318-20 (citing *Beekman v. Saratoga and Schenectady R.R.*, 3 Paige Ch. 44 (N.Y. Ch. 1831), which stated that the public has an interest in the use of the railroad and the company could be assessed damages for refusing to serve without a reasonable excuse).

93. *See id.*

The most plausible theory may be that public employment consisted of “all businesses that [held] themselves out as ready to serve the public.”⁹⁴ This theory is based predominantly on the idea that parties holding themselves out to serve the public agree to an implied contract with all customers.⁹⁵ Therefore, the common law provided that no such duty arose for the person who did “not in anyway advertise.”⁹⁶ However, once that person did “any outward act calculated to induce people to think that he [was] a common innkeeper, he [was] bound as such to receive those who offer themselves.”⁹⁷ The theory suggests that the “act of holding oneself out to the public [is] the voluntary acceptance of a social role that creates obligations when others rely on one’s fulfilling that role.”⁹⁸

Many common-law cases indicate that the common-law duty to serve applies to all businesses that hold themselves out to the public and does not “leave room for exclusion . . . on the ground of race.”⁹⁹ Eventually, courts restricted the common-law duty to serve only to innkeepers and common carriers; these courts were most likely motivated by the desire to protect the property and contractual rights of white business owners who preferred not to serve African-Americans.¹⁰⁰

After the Civil War, many states passed public accommodation statutes allowing the newly-freed slaves access to goods and services, but state courts generally responded by limiting the scope of the laws with narrow definitions of public accommodations and by interpreting racial segregation as a reasonable way to regulate access rather than a complete refusal to serve.¹⁰¹ Courts often limited the statutes by construing them

94. *Id.* at 1331.

95. *See id.* at 1310.

96. *Id.* at 1311 (quoting FREDERICK CHARLES MONCREIFF, *THE LIABILITY OF INNKEEPERS* (1874)).

97. *Id.*

98. *Id.* at 1318.

99. *Id.* at 1334-35 (citing *State v. Kimber*, 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859), an Ohio case in which the court convicted a white conductor of assault and battery for throwing an African-American woman off a train).

100. *See id.* at 1346-48 (referring to MORTON HOROWITZ, *THE TRANSFORMATION OF THE LAW, 1780-1860* (1977), which explains the changes in legal thought based on property and contract law theories).

101. *See id.* at 1382-83. Tennessee and South Carolina even went so far as to repeal their state public accommodation laws, which left businesses with the complete freedom to choose their customers. *See id.* at 1386. Other examples of the narrow interpretation

so narrowly that they covered only those places and activities specifically listed in the statutes.¹⁰² Some suggest, however, that the reasoning behind placing a duty to serve all patrons on anyone who publicly advertises should still be valid today.¹⁰³ These commentators believe that state and federal public accommodation laws should encompass all places open to the public for the following reasons: (1) if the state refuses to apply public accommodation laws to public places, it authorizes discrimination; (2) people have a right to not face discrimination in the marketplace; (3) places that choose to be open to the public waive their "claim [to] any legitimate privacy interests;" and (4) "market mechanisms will not, on their own, accomplish the result of weeding out invidious discrimination."¹⁰⁴

B. The New Jersey Law Against Discrimination

In 1945, the General Assembly of New Jersey passed the New Jersey Law Against Discrimination (NJLAD),¹⁰⁵ which at the time applied only to discrimination in employment.¹⁰⁶ In 1949, the legislature amended the NJLAD to cover discrimination in public accommodations based on race, creed, color, national origin, or ancestry.¹⁰⁷ The amendment's purpose was to ensure that "an establishment which caters to the public . . . cannot refuse to deal with members of the public who have accepted

given state laws include the holding in *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885). *See id.* at 1390-92. There, the court held that places of entertainment did not have a duty to serve the public and the state law only applied to those activities that the government had given an exclusive right to operate. *See Bowlin*, 25 N.W. at 768.

102. *See Singer*, *supra* note 87, at 1394 (citing *Brown v. J.H. Bell Co.*, 123 N.W. 231 (Iowa 1909)).

103. *See id.* at 1412.

104. *Id.* at 1448.

105. N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999). The full text of the current New Jersey Law Against Discrimination reads:

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.

Id.

106. *See* N.J. STAT. ANN. § 18:25-12 (West 1945).

107. *See* N.J. STAT. ANN. § 18:25-4 (West 1949).

the invitation, because of their race, creed, color, national origin, or ancestry.”¹⁰⁸ In enacting the NJLAD, the New Jersey legislature expressed a strong public policy against discrimination, stating that “discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.”¹⁰⁹

A 1991 amendment to the NJLAD expanded the law to cover sexual orientation.¹¹⁰ The law’s legislative history indicates that the General Assembly found the NJLAD a necessary protection against discrimination for New Jersey citizens; the legislature stated that “because of discrimination, people suffer personal hardships, and the State suffers a grievous harm.”¹¹¹ Finding that such personal hardships include physical and emotional stress, emotional trauma, homelessness, career and family disruptions, and adjustment problems, the legislature enacted a law that provides damages for violations to all persons the law protects.¹¹²

C. Construction of the NJLAD

In enforcing the NJLAD, a court must decide which establishments or activities the law considers places of public accommodation, just as the courts at common law had to determine what constituted public employment.¹¹³ Recognizing this, the legislature defined the term “place of public accommodation” to include a list of places and facilities, such as gas stations and restaurants.¹¹⁴ In *Sellers v. Philip’s Barber*

108. *Evans v. Ross*, 154 A.2d 441, 445 (N.J. Super. Ct. App. Div. 1959).

109. N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999).

110. *See* N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999); *see also* Dale v. Boy Scouts of Am., 706 A.2d 270, 287 (N.J. Super. Ct. App. Div. 1998).

111. N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999).

112. *See id.*

113. *See supra* Part II.A.

114. *See* N.J. STAT. ANN. § 10:5-5(1) (West 1998).

A place of public accommodation shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises;

Shop,¹¹⁵ however, the New Jersey Supreme Court held that the definition provided by the NJLAD was intended merely to illustrate the types of establishments and activities covered by the NJLAD and was not an exhaustive list.¹¹⁶ The New Jersey General Assembly clearly intended that the law would be liberally construed.¹¹⁷ Accordingly, the New Jersey Supreme Court held that the NJLAD should be construed as liberally as possible in order to better effectuate the legislation's purpose.¹¹⁸

Furthermore, the New Jersey Supreme Court has held that the legislature intended the NJLAD to apply to goods and activities offered to the general public.¹¹⁹ The test for whether an organization is a place of public accommodation is not whether the NJLAD's definition of public accommodation actually lists the particular establishment, but whether the organization offers activities and accommodations similar to those offered by the facilities enumerated in the NJLAD.¹²⁰

The New Jersey Supreme Court established a further guideline in *Clover Hill Swimming Club v. Goldsboro*,¹²¹ holding

any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. 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.

115. 217 A.2d 121 (N.J. 1966).

116. *See id.* at 123; *see also* *Fraser v. Robin Dee Day Camp*, 210 A.2d 208, 211 (N.J. 1965) (noting that the enumerated facilities within the NJLAD were "merely illustrative of the accommodations the Legislature intended to be within the scope of the statute").

117. *See* N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999) (stating that "[t]he Legislature intends . . . that this act shall be liberally construed").

118. *See Fraser*, 210 A.2d at 211.

119. *See id.*

120. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 280 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

121. 219 A.2d 161 (N.J. 1966).

that a private swimming club was a place of public accommodation because it advertised to and solicited business from the public at large.¹²² The holding in *Clover Hill* is consistent with the language the appellate court used in *Evans v. Ross*,¹²³ which stated that “[o]nce a proprietor extends his invitation to the public he must treat all members of the public alike.”¹²⁴ These cases reinforced the idea that once an establishment offers an open invitation to the general public through advertising and solicitation, it qualifies as a place of public accommodation.¹²⁵

Furthermore, in *National Organization of Women v. Little League Baseball, Inc.*,¹²⁶ the court established that the term “place” in the statute does not necessarily refer to an immovable location.¹²⁷ The court held that little league baseball was a place of public accommodation because “the invitation [to play baseball] is open to children in the community at large, with no restriction other than sex.”¹²⁸ The Court found irrelevant the issue of whether the games took place on various fields rather than in one fixed location.¹²⁹

IV. ANALYSIS OF THE NEW JERSEY APPELLATE COURT’S DECISION IN *DALE*

A. *Is the Boy Scouts a Place of Public Accommodation Under the NJLAD?*

In *Dale*, the appellate court first decided whether the BSA is a place of public accommodation under the NJLAD.¹³⁰ The BSA argued that it was not a place of public accommodation because it did not exclude Dale¹³¹ from any physical location and

122. See *id.* at 165.

123. 154 A.2d 441 (N.J. Super. Ct. App. Div. 1959).

124. *Id.*

125. See *Clover Hill*, 219 A.2d at 165.

126. 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974), *aff’d*, 383 A.2d 198 (N.J. 1974).

127. See *id.* at 37.

128. *Id.* at 37-38.

129. See *id.*; see also Brief of Amicus Curiae New Jersey Lesbian and Gay Law Association for Dale at 6, *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) (No. A-2427-95T3).

130. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

131. See *id.* at 278. Part of the reasoning the lower court followed in deciding that the

because it did not offer membership to the general public but only to those who met its membership requirements.¹³²

The appellate court noted that the New Jersey Supreme Court had already established that places of public accommodation are not limited to fixed locations.¹³³ The court stated that because the purpose of the NJLAD is to eradicate discrimination, it would be "irrational" to allow the NJLAD's "reach" to "turn on the definition of 'place' . . . because 'places do not discriminate; people who own and operate places do.'"¹³⁴ Thus, the court recognized that groups without fixed meeting places are just as likely to discriminate as those with such locations.¹³⁵

The BSA also argued that its minimal membership requirements¹³⁶ distinguished it from entities that extend an invitation to the general public and consequently have to treat all members of the public alike.¹³⁷ Addressing this argument in light of *Clover Hill*, which held that a private swimming club was a place of public accommodation because the club had advertised and extended an invitation to the general public,¹³⁸ the court stated that the "BSA invites the 'public at large' to join its ranks, and is 'dependent upon the broad-based participation of members from the general public.'"¹³⁹ The court found the BSA's membership open and unselective, evidenced by the facts that in 1993 the BSA had nearly five million current members nationwide and that, since its inception in 1910, the

BSA was not a public accommodation rested on the fact that the BSA did not have a regular meeting facility and the NJLAD only applied to those establishments that had a physical facility. *See id.* This suggests that because the BSA was seeking to have the lower court's judgment affirmed, the BSA was also asserting that an organization without a physical location could not be a place of public accommodation under the NJLAD.

132. *See id.* at 281.

133. *See id.* at 279 (citing *National Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33, 38 (N.J. Super. Ct. App. Div. 1974)).

134. *Id.* (quoting *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267-82 (7th Cir. 1993) (Cummings, C.J., dissenting)).

135. *See id.*

136. *See id.* at 281.

137. *See Evans v. Ross*, 154 A.2d 441, 445 (N.J. Super. Ct. App. Div. 1959).

138. *See Dale*, 706 A.2d at 280 (citing *Clover Hill Swimming Club v. Goldsboro*, 219 A.2d 161 (N.J. 1966)).

139. *Id.* (quoting *National Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974)).

BSA had a total of ninety million members.¹⁴⁰ The court further noted that the BSA's own literature states that "[s]couting should be made available for all boys who meet entrance age requirements."¹⁴¹ In addition, the American Civil Liberties Union, acting as amicus curiae for Dale, argued that the BSA and the Monmouth Council, which expelled Dale, "have engaged in . . . extensive advertizing [sic] and public solicitation of members."¹⁴² The BSA's efforts included hosting "'School Nights' as part of recruitment efforts, advertizing [sic] the benefits of their programs to thousands of students each year," using "million-dollar television advertising campaigns to increase their membership, and [hiring] public relations firms and [producing] magazine inserts in nationally circulated magazines to attract new youth members."¹⁴³

The BSA argued that despite this widespread attempt to attract new members, it was still a selective organization because membership "is restricted to those willing and able to understand and live by the Scout Oath and Scout Law."¹⁴⁴ The BSA argued that it was therefore not a place of public accommodation under the Third Circuit's holding in *Kiwanis International v. Ridgewood Kiwanis Club*.¹⁴⁵ In *Kiwanis*, the Third Circuit held that the Ridgewood Kiwanis Club was not a place of public accommodation under the NJLAD because it had very selective membership criteria, under which the club accepted as new members only those people sponsored by existing members.¹⁴⁶ However, the appellate court in *Dale*

140. *See id.* at 281.

141. *Id.*

142. Brief of Amicus Curiae American Civil Liberties Union and the American Civil Liberties Union of New Jersey for Dale at 13, *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) (No. A-2427-95T3).

143. *Id.*

144. *Dale*, 706 A.2d at 281; *see also* Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM. & MARY L. REV. 919 (1989). "'The Scout Oath or Promise' states: 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.'" *Id.* at 939 n.138. "'The Scout Law' states: A Scout Is: Trustworthy. Loyal. Helpful. Friendly. Courteous. Kind. Obedient. Cheerful. Thrifty. Brave. Clean. Reverent.'" *Id.* (quoting W. HILLCOURT, THE OFFICIAL BOY SCOUT HANDBOOK 27, 31 (9th ed. 1986)).

145. 806 F.2d 468 (3d Cir. 1986); *Dale*, 706 A.2d at 281.

146. *See Kiwanis Int'l*, 806 F.2d at 475-76. These criteria included the fact that the club only had twenty-eight members and only sent invitations to join to those persons

distinguished the BSA from the Kiwanis Club, finding the BSA's requirement that members live by the Scout Oath and Scout Law incomparable to a requirement that existing members sponsor new members.¹⁴⁷ Furthermore, because the BSA is a national organization that advertises nationwide to recruit new members, the court found that the BSA's membership policies were not as restrictive as those in *Kiwanis*.¹⁴⁸

The court also noted that the BSA's purported membership criterion was more akin to encouraged behavior than a membership criterion, let alone a selective one.¹⁴⁹ Considering the BSA's own literature, open membership criteria, and attempts to solicit new members from the general public, the appellate court reversed the lower court and found that the BSA was a place of public accommodation within the meaning of the NJLAD.¹⁵⁰

1. Why Not Restrict the Meaning of a "Place of Public Accommodation" to Only Those Activities Connected to a Physical Location?

The appellate court in *Dale* relied heavily on the reasoning in *Little League Baseball* to reject the narrow interpretation of the term "place of public accommodation" that the Seventh Circuit embraced in *Welsh v. Boy Scouts of America*¹⁵¹ and to hold that a membership organization like the BSA did not have to have a fixed location to qualify as a place of public accommodation.¹⁵² Relying on canons of statutory construction, the *Welsh* court found that courts should narrowly construe the federal public accommodations statute, Title II of the Civil Rights Act of

current members already knew. *See id.*; *see also Dale*, 706 A.2d at 281.

147. *See Dale*, 706 A.2d at 281.

148. *See id.*

149. *See id.* The court suggested that what the BSA considered membership criteria were not really criteria used to screen members; the BSA's requiring a boy scout to be able to obey the Scout Law and Scout Oath was similar to the Little League's requiring its players to have the general skills necessary to play the game and to follow the rules of the game. *See id.*

150. *See id.* at 282.

151. 993 F.2d 1267 (7th Cir. 1993) (holding that the BSA is not a place of public accommodation under Title II of the Civil Rights Act of 1964).

152. *See Dale*, 706 A.2d at 279.

1964,¹⁵³ so that the term “place of public accommodation” did not reach activities that are not connected to a fixed physical location.¹⁵⁴ Further, the *Welsh* court implied that these statutory arguments could equally apply to the New Jersey legislature’s definition of the term “place” in the NJLAD.¹⁵⁵

The Seventh Circuit held in *Welsh* that the BSA is not a place of public accommodation within the meaning of Title II because “Title II . . . does not govern membership organizations which do not bear a close connection to a particular ‘establishment,’ ‘place,’ or ‘facility.’”¹⁵⁶ Title II defines a “place of public accommodation” as “places, establishments, lodgings, and facilities” and “provides fifteen specific examples of regulated facilities.”¹⁵⁷ From the statute’s repeated use of the words “place” and “facility,” the court concluded that Congress did not intend Title II to “cover membership organizations lacking a close connection to a particular facility.”¹⁵⁸

153. See 42 U.S.C. § 2000a (1998). The relevant wording of Title II states that:
- (a) 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 . . . without discrimination or segregation on the ground of race, color, religion, or national origin.
 - (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests
 - (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
 - (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
 - (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Id.

154. See *Welsh*, 993 F.2d at 1275.

155. See *id.* at 1271 (stating that the NJLAD is “similar to Title II”).

156. *Id.* at 1275.

157. *Id.* at 1269.

158. *Id.* at 1271. *But see* Edward Bigham, Comment, *Civil Rights—Seventh Circuit Permits Boy Scouts of America to Exclude Atheist—Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993), 67 TEMP. L. REV. 1333, 1353 (1994) (arguing that the *Welsh* court erroneously construed the statute too narrowly because

In construing Title II, the *Welsh* court considered the New Jersey Superior Court's construction of the NJLAD in *Little League*.¹⁵⁹ The Seventh Circuit noted that the *Little League* court had found the word "place" in the NJLAD to be a "term of convenience, not of limitation."¹⁶⁰ In contrast, the *Welsh* court held that Congress did not intend Title II to apply to organizations that, like the BSA, are not "places."¹⁶¹ The court noted that applying the *Little League* court's construction of the NJLAD to Title II would require it to find that "Congress'[s] use of the term 'place' [in Title II] was mere surplusage . . . and that the fifteen specific examples of places fail to illuminate the meaning of the term 'place.'"¹⁶²

Several canons of statutory construction support the *Welsh* court's position.¹⁶³ First, if the meaning of the statute is plain, there is no need for further interpretation.¹⁶⁴ Therefore, according to this canon, when Congress defines the term "place" by listing actual places, the court should look only to that list for a definition of the technical term.¹⁶⁵ Second, "a legislature is presumed to have used no superfluous words," and courts therefore should not interpret statutory terms in such a way that makes them meaningless.¹⁶⁶ Thus, if the list was not meant to be exhaustive, then Congress would not have included it or would have drafted the definition to indicate that the listed places were only examples of public accommodations.¹⁶⁷ Third, the "expression of one thing is the

the court ignored the rule of statutory construction that requires courts to construe ambiguous terms in remedial statutes "in favor of the party for whom the legislation was enacted").

159. See *Welsh*, 993 F.2d at 1272.

160. *Id.* (quoting *National Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974)).

161. See *id.*

162. *Id.*

163. See *Singer*, *supra* note 87, at 1414.

164. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474-76 (1992) (holding that "any judicial inquiry into the meaning of a statute begins and ends with the plain language of the statute, providing it speaks with clarity").

165. See *id.*

166. *Id.*; *Platt v. Union Pacific R.R.*, 99 U.S. 48, 58 (1878).

167. See *Singer*, *supra* note 87, at 1415-16 (suggesting that Congress would have used the words "places of public accommodations include, but are not limited to . . ." if it had not intended the list to be exhaustive).

exclusion of others.”¹⁶⁸ This canon of statutory construction suggests that by stating the places Title II covers, Congress excluded all others.¹⁶⁹

The *Welsh* court ultimately “refuse[d] to read into the statute what Congress . . . declined to include.”¹⁷⁰ The court noted that if Congress had meant to include membership organizations like the BSA, it would have expressly included them or it would have stated that “each of the following, if it serves the public, is a public accommodation.”¹⁷¹ Instead, because Congress used the term “place” and followed it with concrete examples of specific places,¹⁷² the court held that the BSA was not a public accommodation under Title II.¹⁷³

The NJLAD is similar to Title II because its definition of the term “place of public accommodation” includes a list of activities that are covered.¹⁷⁴ However, the NJLAD is different from Title II because the NJLAD expressly states that a “place of public accommodation shall include, but not be limited to . . .” the enumerated list of places.¹⁷⁵ Some of the canons in *Welsh* could apply to the NJLAD; however, an almost equal number of canons favor the interpretation that the *Dale* court followed.¹⁷⁶ For instance, it is possible that the legislature merely listed those places that exemplified the worst offenders (where racial discrimination was most prevalent) to guarantee that courts would definitely enforce the law against them.¹⁷⁷ Furthermore, the court should consider that the NJLAD is a remedial statute that should be interpreted as liberally as possible and should not be interpreted literally if doing so would defeat the statute’s purpose¹⁷⁸—to end discrimination.¹⁷⁹

168. *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 206 (1928) (holding that the rule that “expression of one thing is exclusion of others” must be applied whenever contrary intention is not apparent).

169. *See Singer, supra* note 87, at 1416.

170. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1270 (7th Cir. 1993).

171. *Id.* at 1273.

172. *See id.*

173. *See id.* at 1275.

174. *See id.* at 1271. Compare N.J. STAT. ANN. § 10:5-5(1) (West 1993 & Supp. 1999), with 42 U.S.C. § 2000a-b (1998).

175. N.J. Stat. Ann. § 10:5-5(1) (West 1993 & Supp. 1999).

176. *See Singer, supra* note 87, at 1421.

177. *See id.* (suggesting that Congress meant for the enumerated list of places in Title II to serve a similar purpose).

178. *See id.*; *see also* N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999) (stating that the

In his dissenting and concurring opinion in *Dale*, Judge Landau indicated that he might have been persuaded by the *Welsh* court's argument, but he was bound by the "enduring, legislatively undiluted, vitality of the *Little League* opinion" to accept the majority's finding.¹⁸⁰ In Landau's view, "[i]t is unlikely . . . that the New Jersey Legislature originally intended that private groups, large or small, would be deemed to be 'places' of public accommodation, akin to hotels, stores, restaurants, theaters and the like."¹⁸¹ He also pointed out that the use of the words "other real property" in the statute's definition of "place of public accommodation" inclined him toward "a property-based interpretation, were this truly a matter of first impression."¹⁸² However, even the dissent acknowledged that the majority's reasoning had the strength of time behind it and that surely if the legislature had disagreed with the outcome in *Little League* it had ample opportunity to clarify the issue by amending the law.¹⁸³ Furthermore, the majority construed the statute in the manner most consistent with the legislature's own declaration that the purpose of the law is to totally stamp out discrimination.¹⁸⁴ The common-law rationale behind holding businesses to a duty to serve—that a business that holds itself open to the general public accepts a duty to serve everyone—also supports the majority view.¹⁸⁵ If the duty to serve came from the idea that the public relies on a business's offer and should not be turned away for discriminatory reasons, then it makes no sense to exempt an organization such as the BSA from having to honor its offer merely because it does not operate from a fixed location.¹⁸⁶

"Legislature intends . . . that this act shall be liberally construed").

179. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 287 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

180. *Id.* at 293-94 (Landau, J., concurring and dissenting).

181. *Id.* at 293 (Landau, J., concurring and dissenting).

182. *Id.* (Landau, J., concurring and dissenting).

183. See *id.* at 293-94 (Landau, J., concurring and dissenting).

184. See N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999) (declaring that discrimination "menaces the institutions and foundation of a free democratic State").

185. See *Dale*, 706 A.2d at 280; Singer, *supra* note 87, at 1305.

186. Cf. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1282 (7th Cir. 1993) (Cummings, C.J., dissenting) (stating that construing Title II to only apply to activities which are conducted in a fixed location would be irrational because "places do not discriminate; people who own and operate places do").

2. The Criteria of Open Membership, Size, and Advertising Versus a Relationship-based Approach

The appellate court in *Dale* held that the BSA was a place of public accommodation under the NJLAD because it advertised and opened its membership to the general public.¹⁸⁷ When confronted with the same question under the Kansas Act Against Discrimination (KAAD),¹⁸⁸ the Kansas Supreme Court, rather than relying solely on factors such as the selectivity of the membership criteria, whether the organization operated from a fixed location, or whether the group advertised to attract new members, used additional criteria based on the type of relationship that existed among the organization's members.¹⁸⁹ In this way, the court distinguished social organizations, like the BSA, from commercial activities, like operating a hotel or restaurant, which people have traditionally considered places of public accommodation.¹⁹⁰ The analysis suggests that if the member's relationships are "relatively noncontinuous, and . . . the personal and social aspects of the relationships are relatively insignificant," then the activity is a public accommodation; however, if the relationships "are personal,

187. See *Dale*, 706 A.2d at 280; see also *Clover Hill Swimming Club v. Goldsboro*, 219 A.2d 161 (N.J. 1966) (holding that the private swimming club in question was a place of public accommodation because it advertised and solicited business from the public at large).

188. See KAN. STAT. ANN. § 44-1001 (1993). The relevant language of the statute reads: [I]t is hereby declared to be the purpose of this act to establish and to provide a state commission having power to eliminate and prevent segregation and discrimination, or separation in employment, in all places of public accommodations covered by this act, [and] in housing because of race, religion, color, sex, disability, national origin or ancestry

Id.

189. See *Seabourn v. Coronado Area Council of the Boy Scouts of Am.*, 891 P.2d 385, 402 (Kan. 1995). This case dealt with a father and son who were excluded from the BSA because they refused to declare their faith in God. See *id.* The court held that the BSA is not a place of public accommodation under the KAAD because "relationships [in scouting] are continuous, personal, and social and take place, more or less, outside of public view" and are unlike those relationships in "establishments commonly thought of as public accommodations . . ." *Id.* at 406. However, the court was also persuaded by the lower court's finding that the BSA "is not an organization open to the general public" because "[m]embership is limited to male youth between the ages of [eleven] and [eighteen] who promise to observe the Scout Oath and Scout Law" and that the adult leadership positions are "restricted to qualified adults who subscribe to . . . the Scout Oath, and the Scout Law." *Id.* at 392-93.

190. See *id.* at 405-06.

social, continuous, and gratuitous," the activity would be private and the statute is not applicable.¹⁹¹

Considering the members' relationship adds a depth to the determination that is absent when a court merely looks at the overall size of a national organization, especially when the organization regularly breaks down into smaller groups and rarely interacts at the national level.¹⁹² Simply using the criteria that the New Jersey Supreme Court has adopted to define public accommodations, including the organization's size and whether it advertises, may bring into the NJLAD's coverage many private groups that the legislature never intended to reach.¹⁹³ The New Jersey Supreme Court would probably find this result acceptable given its emphasis on the importance of construing the NJLAD in a manner that best effects the Act's purpose of ending discrimination.¹⁹⁴

However, not all courts believe that state legislatures and Congress intended to bring all private clubs and associations under the public accommodation umbrella.¹⁹⁵ The number of

191. *Id.* at 405 (quoting Horowitz, *The 1959 California Equal Rights in 'Business Establishments' Statute—A Problem in Statutory Application*, 33 S. CAL. L. REV. 260, 288-90 (1960)). Under this analysis, the BSA would qualify as having such a relationship. The BSA presented evidence that the "relationship of members . . . to the organization and to one another is very, very different from the relationship of a patron to the kinds of business establishments explicitly mentioned or generally described in the statute . . ." *Id.* at 394 (quoting an affidavit submitted by the BSA at trial). Furthermore, the court accepted the evidence presented that "[t]he relationship is continuous" with scouts remaining with a certain group of boys "for a period of years" and meeting "weekly, at least, and if not more often." *Id.*

192. *See id.* at 388 (noting that a Scout troop is composed of smaller patrols, which are in turn composed of three to eight boys, and that the entire troop meets less frequently); *see also* *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993) (finding that "the typical Boy Scout gathering involves five to eight young boys engaging in supervised interpersonal interaction in a private home").

193. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 1999 734 A.2d 1196 (N.J. 1999) (Landau, J., concurring and dissenting) (noting that "[i]t is unlikely . . . that the New Jersey Legislature originally intended that private groups, large or small, would be deemed 'places' of public accommodation"), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000); *see also Seabourn*, 891 P.2d at 406 (quoting *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 602 (Cal. Ct. App. 1994), *aff'd*, 952 P.2d 218 (Cal. 1998)) (suggesting that if an organization with characteristics such as those of the BSA is a place of public accommodation, then organizations such as the "local Girl Scout groups and even the Archdiocese of Los Angeles of the Roman Catholic Church could not escape such classification either").

194. *See, e.g., National Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974); *Evans v. Ross*, 154 A.2d 441 (N.J. 1959).

195. *See Dale*, 706 A.2d at 278. The court noted that the "extreme divergence of views

cases conflicting with *Dale*¹⁹⁶ and the substantial outcry it raised, indicate that people are reluctant to accept the proposition that the BSA is not free to choose its own members.¹⁹⁷ The Kansas Supreme Court has created a well-reasoned approach to defining public and private clubs, one that could help ensure that private organizations, in which relationships are more personal than commercial, are allowed to make decisions regarding membership without risking liability under public accommodation statutes.¹⁹⁸

B. Does Enforcement of the NJLAD Violate the BSA's Freedom of Association?

Once the *Dale* court determined that the BSA was a place of public accommodation within the meaning of the NJLAD, the court then decided whether the statute, as applied to prohibit the BSA from excluding members because of their sexual orientation, would violate the BSA's freedom of expressive association.¹⁹⁹ The BSA argued that forcing the BSA to accept

on social issues is emphasized by the prevalence of vigorous dissenting opinions." *Id.*

196. See, e.g., *Welsh*, 993 F.2d at 1282; *Seabourn*, 891 P.2d at 402.

197. See *Court Upholds Scouts' Honor*, INVESTOR'S BUSINESS DAILY, Mar. 26, 1998, at A30, available in 1998 WL 5071202. The editor wrote that, "[u]nlike a business, the BSA isn't a 'public accommodation' and never claimed to be," and noted that the BSA excludes girls and boys who do not "accept the Scouts' standards." *Id.* Furthermore, the editor suggested that the "First Amendment's right to assembly . . . should be guarded jealously." *Id.* This includes "a private group's right to admit whomever it chooses." *Id.* He believed that a ruling that would force the BSA to accept homosexuals or atheists would "empty the Boy Scout oath of its homage to God [and] moral virtue." *Id.* This would "destroy the group's reason to exist," and the editor therefore criticized the attempt of civil rights activists to "make every organization comply with their notions of how the world should be" even if that "means destroying private groups that help make a better world." *Id.* See also Paul Mulshine, *The Judges Were Lost in the Woods*, THE STAR-LEDGER (Newark, N.J.), Mar. 8, 1998, at 3, available in 1998 WL 3397158. The author noted that the decision that the BSA is a public accommodation "is fine in theory, but it is the type of decision that makes me glad to have daughters." *Id.* He suggested that the court "failed to recognize a conflict of interest that occurs when any young male, gay or straight, is put in a position of authority over those for whom he has a sexual attraction." *Id.* Mulshine also argued that parents should have a right to "be extremely choosy" about whom they will allow to associate with their children and that the court's decision to pre-empt that right "conflicts directly with that most American of beliefs, the one embodied in the saying 'It's a free country.'" *Id.*

198. See *supra* note 189 and accompanying text.

199. See *Dale*, 706 A.2d at 284. The court held that the BSA's freedom of intimate association was not at issue in this case because the BSA consists of nearly 5,000,000 members, is open to all boys, and advertises aggressively, whereas the freedom of

homosexual members violated its freedom of expressive association because its members believed that avowed homosexuals might present values and views on homosexuality that are "antithetical to boy scout teachings and activities."²⁰⁰ Furthermore, the BSA suggested that the homosexual lifestyle conflicts with the Scout Oath, which requires "that the scout be 'morally straight,'" and the Scout Law, which requires scouts to be "clean."²⁰¹

*1. The Appellate Court's Analysis of the BSA's Argument under the Roberts Trilogy*²⁰²

The appellate court in *Dale* recognized people's right to come together in groups to advocate their points of view²⁰³ and noted that the United States Supreme Court had created a framework for analyzing claims by groups that a public accommodation law has violated the groups' right to associate.²⁰⁴ This framework suggests that the right to expressive association is not absolute, but can be infringed when the state has "compelling . . . interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."²⁰⁵ In

intimate association is only implicated when the group is relatively small, highly selective, and meets in relative seclusion. *See id.* at 286. Furthermore, the court noted that the trial court had also recognized that the BSA's freedom of expression was at issue because it held that "the First Amendment freedom of association sheltered [the BSA] from the [NJLAD's] reach" and accepted the BSA's argument that "the BSA's fundamental right of freedom of expression permits it to exclude avowed homosexuals." *Id.* at 284.

200. *Id.*

201. *Id.* at 285. The trial judge stated that:

It is abundantly clear . . . that from its inception Scouting has excluded . . . any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present. Such policy applies, a fortiori, to one who engages in homosexual conduct. It is the firm position of the BSA that such conduct is not 'morally straight' under the Scout Oath nor is it 'clean' under the Scout Law.

Id. (quoting *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Ch. Div. 1995) (quoting the Scout Oath and Scout Law)).

202. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

203. *See Dale*, 706 A.2d at 285 (explaining *NAACP v. Alabama ex re/ Patterson*, 357 U.S. 449 (1958)).

204. *See id.* (discussing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

205. *Id.* at 286 (quoting *Roberts*, 468 U.S. at 623); *see also* discussion, *supra* Part II.

other words, a public accommodation law can interfere with a group's membership decisions as long as the law does not stop the group from excluding certain persons because they have different ideologies or philosophies than the existing members.²⁰⁶ Furthermore, the law's enforcement does not violate a group's First Amendment rights if it does not significantly affect the members' ability to carry out the purpose for which they formed the group.²⁰⁷ In summing up the state of the law, the court pointed to the undeniable "tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discrimination," but stated that courts can reconcile the two goals as long as the "state's enforcement of its anti-discrimination law is unrelated to the suppression of ideas" and does not significantly keep the organization from fulfilling its purpose.²⁰⁸

To reach such a reconciliation, the court had to determine whether New Jersey had such a compelling state interest and whether prohibiting the BSA from excluding homosexuals would significantly "impair [its] ability to express its fundamental tenets" and to carry out its purpose.²⁰⁹ The court established New Jersey's compelling state interest in eradicating discrimination by reviewing the history of the NJLAD,²¹⁰ as well as judicial opinions, holding that the "overarching goal of the [NJLAD] is nothing less than

206. See *Roberts*, 468 U.S. at 627.

207. See *Dale*, 706 A.2d at 286 (explaining *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987)).

208. *Id.* at 287.

209. *Id.*

210. See N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999). The legislative history of the NJLAD indicates that the New Jersey General Assembly found discrimination to be a compelling state interest:

[P]ractices of discrimination against any of [the state's] inhabitants, because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State

Id.

eradication' of discrimination."²¹¹ The court also recognized that the legislature demonstrated a strong interest in protecting homosexuals from discrimination when it amended the NJLAD in 1991 to include sexual orientation.²¹² As discussed above, the court could have strengthened the argument in favor of enforcing the NJLAD by recognizing that Dale also had a positive interest in associating with the BSA.²¹³ The court could have added this positive interest to the scale when balancing the negative interest in association against the state's compelling interest in providing equal access to all persons.²¹⁴

After establishing that New Jersey had a compelling state interest in prohibiting the BSA from excluding members because of their sexual orientation,²¹⁵ the court found that enforcing the NJLAD would not significantly impair the BSA's ability to advocate its fundamental message and to engage in those activities for which Congress chartered it.²¹⁶ Relying in part on the fact that Congress chartered the BSA for the purpose of promoting patriotism, courage, and self-reliance, the court established that the "BSA's 'collective expressive purpose' is not to condemn homosexuality" but to teach scouts the "values of trustworthiness, honesty, independence, physical and moral courage, commitment, cleanliness, and fidelity."²¹⁷ The court also relied on the BSA's literature, which had never mentioned the BSA's prohibition on homosexual members or leaders until a 1991 special position statement set forth the

211. *Dale*, 706 A.2d at 287 (quoting *Fuchilla v. Layman*, 537 A.2d 652 (N.J. 1988)).

212. *See id.* The court noted that the legislature's amendment of the NJLAD in 1991 was an "implicit recognition that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears [sic] no relationship to reality cannot be countenanced." *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984)); *see also* Brief of Amicus Curiae New Jersey Lesbian and Gay Law Association for Dale at 13-14, *Dale* (No. A-2427-95T3). The brief recounts the legislature's long-standing policy against discrimination on the basis of sexual orientation, noting that New Jersey has repealed its sodomy law, passed legislation prohibiting sexual orientation discrimination in the granting of public works contracts, and extended prison sentences for those who commit bias crimes. *See id.* at 13. Furthermore, the brief illustrates the New Jersey courts' commitment to this issue by noting that the appellate court has permitted the adoption of a child by the same-sex partner of the child's biological parent. *See id.* at 14.

213. *See supra* Part II.E.

214. *See id.*

215. *See Dale*, 706 A.2d at 287.

216. *See id.* at 288.

217. *Id.*

BSA's belief that homosexuals could not be good role models for scouts.²¹⁸ The court characterized this position statement as primarily a "litigation stance taken by the BSA rather than an expression of a fundamental belief concerning its purposes."²¹⁹ Therefore, the court held that because the BSA's purpose is not to advance an anti-gay agenda, forcing the BSA not to discriminate against homosexuals would not affect the BSA's ability to carry out its purpose.²²⁰

This holding is consistent with that of the United States Supreme Court in *New York State Club Ass'n*, which held that an organization is not protected by the First Amendment unless "its collective purpose is to 'exclude individuals who do not share the views that the club's members wish to promote.'"²²¹ The appellate court in *Dale* found that the BSA was not protected by the First Amendment because the facts surrounding the BSA's policy statement on homosexuality tended to prove that the BSA's position on homosexuality was not a "collective view that brought [its members] together."²²²

2. *Why Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston Does Not Apply*

The BSA argued that under the United States Supreme Court's holding in *Hurley v. Irish-American Gay, Lesbian and*

218. *See id.* at 289-90.

219. *Id.* The court also spent considerable time discussing the fact that the BSA never placed its policy on homosexuality in its corporate by-laws, rules, regulations, or handbooks and suggested this evidence showed that the position had never been widely disseminated to its members or to the public. *See id.* Furthermore, the court stated that many of the church groups that were closely affiliated with the BSA have come out against the policy. *See id.* at 291.

220. *See id.* at 288.

221. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1987); *see also supra* Part II.D.

222. *Dale*, 706 A.2d at 291 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)); *see also* Brief of Amicus Curiae American Civil Liberties Union and the American Civil Liberties Union of New Jersey for Dale at 21, *Dale* (No. A-2427-95T3). This reasoning is consistent with amicus curiae's argument that the holding in *New York State Club Ass'n* does not reach the BSA because, under this holding, "only an organization like the Ku Klux Klan, whose primary organizational purpose is to advocate racial separation and assert white superiority . . . can use associational freedom as an exemption from statutory non-discrimination requirements" and the BSA's primary organizational purpose is not to advance an anti-gay agenda. *See id.* at 21-22.

Bisexual Group of Boston,²²³ enforcement of the NJLAD would violate the BSA's freedom of expressive association.²²⁴ In *Hurley*, the Supreme Court held that by requiring private citizens organizing a parade to include marchers with whose message the organizers disagreed, the Massachusetts public accommodation law violated the organizers' First Amendment rights.²²⁵

The City of Boston authorized the South Boston Allied War Veterans Council (Council), an association of private individuals, to organize an annual St. Patrick's Day Parade.²²⁶ In 1992, the members of the Gay, Lesbian, and Bisexuals Group of Boston (GLIB) formed for the purpose of marching in the parade to show pride in their Irish heritage and their homosexuality.²²⁷ The Council refused GLIB's application for permission to march as a group and carry a banner bearing its name.²²⁸ GLIB filed suit against the Council for violating the Massachusetts public accommodation law, which prohibits discrimination in "any place of public accommodation, resort or amusement."²²⁹ The trial court found that the parade was an event open to the general public because the Council had not employed any written criteria or procedures for admitting marchers and had not previously reviewed the specific message of other groups for suitability.²³⁰ Furthermore, the trial court stated that requiring the Council to allow GLIB to march would not violate the Council's First Amendment rights because, to be protected, an expressive association must focus on a specific message and, without any connection among the eclectic messages represented in the parade, the parade lacked any specific expressive purpose.²³¹ The trial court also analyzed the case under the factors set out in *Roberts*,²³² concluding that any infringement on the Council's right of expressive association

223. 515 U.S. 557 (1995).

224. *See Dale*, 706 A.2d at 291.

225. *See Hurley*, 515 U.S. at 566.

226. *See id.* at 560.

227. *See id.* at 561.

228. *See id.* at 570.

229. MASS. GEN. LAWS ch. 272, § 98 (1998).

230. *See Hurley*, 515 U.S. at 561-62.

231. *See id.* at 563.

232. 468 U.S. 609 (1984); *see also supra* Part II.B.

would be incidental and not greater than necessary to achieve the state's compelling interest in ending discrimination.²³³

The United States Supreme Court reversed, finding that the parade was a form of expression protected by the right to free speech, regardless of whether "a narrow, succinctly articulable message" was presented, because the First Amendment does not require the speaker to "isolate an exact message as the exclusive subject matter of the speech."²³⁴ The Court noted that the Massachusetts statute is constitutional on its face because, by prohibiting discrimination against individuals in the "provision of publicly available goods, privileges, and services," it targeted not speech, but conduct.²³⁵ In this case, however, the Council had been willing to allow homosexuals to march and had only objected to allowing GLIB to march as a separate parade unit carrying its own banner.²³⁶ The Court found that the public accommodation statute could be applied to prohibit the Council from excluding homosexuals from marching in the parade because of their sexual orientation, but could not be used to force the Council to accept GLIB's message into the parade.²³⁷ The Court stated that this result is consistent with the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," including the right to decide what not to say.²³⁸ The Court thus characterized the public accommodation at issue as the Council's speech itself and held that if the law acted to provide access, it would result in an unconstitutional suppression of ideas.²³⁹

The appellate court in *Dale* rejected the argument that *Hurley* applied to the BSA's freedom of expression claim.²⁴⁰ The court noted that the *Hurley* Court focused on the Council's freedom of speech rather than its freedom of expressive

233. See *Hurley*, 515 U.S. at 563.

234. *Id.* at 569-70.

235. *Id.* at 572.

236. See *id.*

237. See *id.* at 573 ("[T]his use of the State's power violates the fundamental rules of protection under the First Amendment . . .").

238. *Id.*

239. See *id.*

240. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 291 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999) (noting that *Hurley* is not dispositive of this case), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

association because the Court treated the parade itself as the Council's "collective expressive views" or "as a form of pure speech."²⁴¹ The court distinguished the BSA from the Council by noting that the Council did not deny GLIB the privilege of marching in the parade, but merely denied them the right to alter the content of the Council's speech by marching as a separate parade unit carrying a banner displaying its name.²⁴² Conversely, Dale merely sought access to the privilege of scouting and did not seek to alter the message or purpose of the BSA.²⁴³

Although the majority explained at length why *Hurley* was not dispositive, the dissent suggested the opposite by relying on *Hurley* for the proposition that the NJLAD does not provide the state with a right to compel a group to accept members whose views would "trespass on the organization's message itself."²⁴⁴ This argument is consistent with *New York State Club Ass'n*, in which the Supreme Court held that state anti-discrimination laws are constitutional as long as they do not stop clubs from excluding members who do not share the same philosophies or ideals.²⁴⁵ The dissent in *Dale* saw no distinction between Dale's publicly avowing his homosexuality through a newspaper article and GLIB's carrying a banner in the parade.²⁴⁶ The dissent reasoned that forcing the BSA to accept homosexual members alters the message that the BSA communicates via its membership policies to the same extent that forcing the Council to accept GLIB and its banner altered the Council's message communicated via its parade.²⁴⁷ Therefore, the dissent reasoned, enforcement of the NJLAD to force the BSA to accept homosexuals would be a violation of the BSA's freedom of expressive association.²⁴⁸ The dissent's argument has merit if the courts believe that the act of accepting a member into a

241. *Id.* at 292.

242. *See id.*

243. *See id.* at 293 (noting that Dale's "public acknowledgment that he is a homosexual is hardly comparable to a banner in a parade declaring his pride in his homosexuality").

244. *Id.* at 295 (Landau, J., concurring and dissenting) (quoting *Hurley*, 515 U.S. at 580).

245. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

246. *See Dale*, 706 A.2d at 295 (Landau, J., concurring and dissenting).

247. *See id.* (Landau, J., concurring and dissenting).

248. *See id.* (Landau, J., concurring and dissenting).

group actually conveys a central message that is worthy of constitutional protection.²⁴⁹

Some commentators suggest that in *Hurley* the Supreme Court failed to recognize the communicative and expressive value of membership decisions.²⁵⁰ For instance, by excluding women, the Jaycees sent the message that “sexism is good.”²⁵¹ Following this reasoning, laws that forced the BSA to accept homosexuals would also force it to change the message it expressed by excluding them.²⁵² Because the NJLAD is directed to discrimination based on certain criteria, however, commentators argue that it targets conduct and not expression.²⁵³

When a group like the BSA engages in both expressive and non-expressive conduct by having membership policies that send a discriminatory message as well as providing some form of good or service, scholars suggest that courts should consider whether the group provides citizens with a non-expressive societal resource that is necessary to their development, such as leadership skills or business contacts.²⁵⁴ Under this analysis, if the resource is not merely tangential to the purpose of the group, the public accommodation law could be validly applied to the organization to guarantee that all citizens had equal access to the resource.²⁵⁵ In other words, if people would still join the organization even if it did not provide that resource, then the group would be primarily expressive and the law would not apply.²⁵⁶ Conversely, if, without the resource, people would not join the organization, then the public accommodation law should apply to ensure that all citizens have equal access.²⁵⁷ Under this analysis, the NJLAD applies to the BSA because people do not join the BSA solely to promote the message that

249. *See id.* (Landau, J., concurring and dissenting). Judge Landau stated that “when we force the [BSA] to permit [Dale] to serve as a volunteer leader, we force them equally to endorse his symbolic, if not openly articulated, message.” *Id.* (Landau, J., concurring and dissenting). *See generally* Perlman, *supra* note 5.

250. *See* Perlman, *supra* note 5, at 112-13.

251. *See id.* at 122.

252. *See id.*

253. *See id.* at 128.

254. *See id.* at 126.

255. *See id.* at 130.

256. *See id.*

257. *See id.*

homosexuality is immoral but to take advantage of the training and recreational opportunities that the BSA offers.²⁵⁸

The dissent in *Dale* disagreed, however, with the majority's holding that the First Amendment does not protect the BSA because the BSA provided no evidence that it came together for the purpose of advancing an anti-gay agenda.²⁵⁹ The dissent stated that the court should not "tell the Boy Scouts what to believe," and that it was irrelevant whether the BSA's position on homosexuality was a recent invention that was not fundamental to the BSA's formation.²⁶⁰

The dissent argued that the court should not examine the BSA's stated message to determine whether that message is the organization's central tenet or merely a sham adopted for the purpose of litigation.²⁶¹ However, the United States Supreme Court established the court's duty to do so in *Roberts*, when it held that the public accommodation law only violates a group's freedom of expressive association when it would require a change in the expressive purposes that "brought [the group's original members] together."²⁶² Therefore, the court must first establish which of the group's messages actually brought the members together before it can decide whether enforcement of the statute alters that message.²⁶³ Furthermore, if the court does not examine whether the group has contrived a message to circumvent an anti-discrimination law, nothing would stop the BSA from adopting the position that Jews or African-Americans are incapable of being brave and cheerful, and because the Scout Oath requires these qualities, the BSA no longer accepts Jews or African-Americans as members.²⁶⁴ The argument that

258. See *supra* Part IV.B.1.

259. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 295 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999) (Landau, J., concurring and dissenting), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

260. *Id.* (Landau, J., concurring and dissenting).

261. See *id.* (Landau, J., concurring and dissenting).

262. *Roberts*, 468 U.S. at 623; see also Brief of Amicus Curiae American Civil Liberties Union and the American Civil Liberties Union of New Jersey for Dale at 20-21, *Dale* (No. A-227-95T3) (quoting *Roberts*, 468 U.S. at 623).

263. See *Dale*, 706 A.2d at 291. The court found that "the facts diminish the BSA's assertion that its policy excluding avowed gays was a collective view that 'brought [its members] together.'" *Id.* (quoting *Roberts*, 468 U.S. at 623). This finding implies that the court had to determine which message actually brought the BSA together in order to conduct its analysis.

264. Cf. Bigham, *supra* note 158, at 1356 (noting that by failing to construe Title II so

the court should not determine whether a group's message is actually part of its reason for existing could therefore devastate states' abilities to end discrimination against minority groups.²⁶⁵

Furthermore, the dissent did not address the majority's finding that *Hurley* does not apply in Dale's case.²⁶⁶ According to the majority, *Hurley* followed the reasoning of the *Roberts Trilogy*,²⁶⁷ which states that a public accommodation law is constitutional as long as it does not target a group's speech.²⁶⁸ *Hurley* merely recognized that as applied in *Hurley*, the Massachusetts statute targeted the Council's speech and therefore could not be enforced.²⁶⁹ Even after *Hurley*, the BSA must carry the heavy burden established by the *Roberts Trilogy* of showing that having to accept homosexuals as members and leaders would impair the BSA's ability to carry out its purpose.²⁷⁰ Therefore, the majority correctly found *Hurley* inapplicable to the BSA's claim.²⁷¹

that it applies to the BSA, the *Welsh* court "laid the foundation for additional discrimination by the Boy Scouts").

265. Cf. *National Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974) (stating that if Little League "were not deemed a place of public accommodation it would be free to discriminate on the basis of race and religion as well as sex"). But see *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998). In holding that the BSA was a place of public accommodation under the Unruh Civil Rights Act, the lower court had expressed concern that a failure to find that the Act applied to the BSA would leave the BSA free to discriminate against individuals on any basis, including race. See *id.* at 238. But the California Supreme Court rejected the lower court's concern, finding that the BSA would not be able to discriminate based on race because race is a constitutionally suspect class. See *id.* at 239. Furthermore, the court found that even if this additional remedy did not stop the BSA from discriminating, the choice to extend the law to cover the BSA should be left to the legislature. See *id.*

266. See *Dale*, 706 A.2d at 293-94 (Landau, J. concurring and dissenting).

267. See *id.* at 293.

268. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

269. See *Perlman*, *supra* note 5, at 121 (stating that in both *Hurley* and *Roberts* the Court asked whether the public accommodation statutes were directed at altering the groups' speech and concluded that it did not in *Roberts*, but did in *Hurley*).

270. See Brief of Amicus Curiae American Civil Liberties Union and the American Civil Liberties Union of New Jersey for Dale at 21, *Dale* (No. A-2427-95T3) (stating that "any institution that seeks an exemption from anti-discrimination laws based on the right of expressive association bears the extraordinarily heavy burden of showing that its members have come together . . . for the purpose of advancing such discrimination").

271. See *id.* at 33 (arguing that the Superior Court's reliance on *Hurley* in deciding Dale's claim was misplaced).

V. THE NEW JERSEY SUPREME COURT AFFIRMS THE NJAD'S CONSTITUTIONALITY AS APPLIED TO THE BSA

On appeal, the New Jersey Supreme Court affirmed the appellate court's decision.²⁷² The court agreed that the NJLAD does not require that a public accommodation be conducted in one particular location.²⁷³ Citing its *Little League* decision, the court noted that "[i]n New Jersey, 'place' has been more than a fixed location since 1974"²⁷⁴ and agreed that allowing the reach of the NJLAD to turn on the definition of "place" would be irrational because places do not discriminate, people do.²⁷⁵ Next, the court considered such factors as whether the BSA engaged in broad public solicitation, maintained a close relationship with the government or other public accommodations, or resembled previously recognized public accommodations.²⁷⁶ The court found that because of the BSA's widespread use of television and magazine advertising to recruit new members and its close affiliation with government agencies, such as the military and public school sponsors, the BSA closely resembled traditionally-recognized places of public accommodations.²⁷⁷

The court also affirmed that forcing the BSA to include homosexuals within its membership did not infringe upon its First Amendment rights.²⁷⁸ The supreme court's analysis largely mirrored the appellate division's.²⁷⁹

Notably, however, the supreme court's analysis of the BSA's intimate association claim differed from the appellate court's analysis. The BSA argued that if its associational rights were measured at a local troop level, the outcome should differ from that reached by the appellate court, which only considered the intimate association claim of the BSA as a nationwide organization.²⁸⁰ The court disagreed, however, relying in part on

272. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, ___ U.S. ___, 120 S. Ct. 865 (2000).

273. See *id.* at 1209-10.

274. *Id.* at 1209 (quoting *National Org. of Women v. Little League Baseball, Inc.*, 328 A.2d 198 (1974)).

275. See *id.* at 1210.

276. See *id.* at 1210-11.

277. See *id.* at 1210-13.

278. See *id.* at 1219.

279. See *id.*

280. See *id.* at 1221.

the holding in *Rotary Club* that a local club with as few as twenty members did not qualify for intimate association protection.²⁸¹ However, the court's main reason for denying the BSA's intimate association claim appeared to be the fact that even at the local troop level, the BSA's membership policy was not selective because it welcomed all eligible boys.²⁸² Furthermore, the court stressed that the BSA's troop leaders do not "have private or intimate relationships with the troop members" and that the BSA encourages nonmembers to attend meetings.²⁸³

The court examined the expressive association claim in light of the *Roberts Trilogy* holdings and affirmed that forced inclusion of homosexuals into the BSA would not significantly affect the BSA's ability to disseminate its message.²⁸⁴ The court found that although the BSA does express a belief in moral values and encourages the development of such values in its members, the BSA members did not associate in order to express the view that homosexuality is immoral.²⁸⁵ Rejecting the BSA's argument that its handbook's definitions of "morally straight" and "clean" express the view that homosexuality is immoral, the court stated that the record of the case itself suggested that within the BSA not all sponsors and members agreed on a single view on this issue.²⁸⁶

Furthermore, the court noted that the BSA's litigation stance on homosexuality is inconsistent with its traditional commitment to a diverse and representative membership.²⁸⁷ The court therefore concluded that Dale's expulsion was "based on little more than prejudice and not on a unified [BSA] position; in other words, Dale's expulsion [was] not justified by the need to preserve the organization's expressive rights."²⁸⁸ Reiterating New Jersey's strong, historical commitment to protect individuals from discrimination, the court indicated that even if forcing the BSA to accept Dale slightly infringed upon

281. *See id.* at 1222.

282. *See id.*

283. *Id.*

284. *See id.* at 1222.

285. *See id.* at 1223.

286. *See id.* at 1224.

287. *See id.* at 1226.

288. *Id.*

the BSA's right to expressive association, the state's unquestionably compelling interest in eliminating discrimination justified that infringement.²⁸⁹

The BSA also re-argued its contention that under *Hurley*, the forced inclusion of Dale would violate the BSA's freedom of speech.²⁹⁰ The court disagreed, again following the appellate court's reasoning. Distinguishing the two cases, the court affirmed that, unlike the parade in *Hurley*, Dale's membership in the BSA was not a form of pure speech.²⁹¹ Rejecting the notion that Dale's mere presence in the BSA would symbolize the BSA's acceptance of homosexuality, the court refused to find that Dale's membership in the BSA resulted in forced speech.²⁹²

CONCLUSION

The New Jersey Supreme Court's decision indicates that the appellate court's decision in *Dale* was well-reasoned and consistent with applicable legal precedent. Moreover, many will agree that the court found the morally and politically correct outcome.

It is apparent, however, that the tension between the principle of equality for all citizens and the fundamental right to associate with only those of our choosing will not be immediately resolved by the *Dale* decisions. The issue is clearly drawn along lines which go much deeper than the courts can delve. This case implicates not only a group's desire to make a political statement on morals, but also the fear that many Americans have, warranted or not, of exposing their children to alternative lifestyles and, in their view, free moral standards.²⁹³

The U.S. Supreme Court is now in a position to render an opinion that could alleviate this tension. The New Jersey courts followed clear state policy established by both the New Jersey General Assembly and the New Jersey Supreme Court in passing and broadly construing sweeping anti-discrimination

289. *See id.* at 1228.

290. *See id.* at 1228-29.

291. *See id.* at 1228.

292. *See id.* at 1229.

293. *See* Mulshine, *supra* note 197.

legislation.²⁹⁴ Although many people disagree with classifying the BSA as a place of public accommodation, both the New Jersey case law and early common-law decisions offer substantial support for the *Dale* courts' holdings.²⁹⁵

Furthermore, the *Roberts Trilogy* established the idea that large membership organizations are just as liable for engaging in invidious discrimination as a restaurant or a gas station.²⁹⁶ Absent a clear and substantial interference by a law with a group's activities and central message, the law will not be struck down as an unconstitutional interference with the group's freedom of expressive association.²⁹⁷

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294. See *supra* Part III.B-C.

295. See *supra* Part III.A-C.

296. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

297. See McKenna, *supra* note 3, at 1067.

