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J. Craig Buchan

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NOTES

Constitutional Law: *Boy Scouts of America v. Dale*: The Scout Oath and Law Survive Government Intrusion

Introduction

> *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.*
>
> — The Boy Scout Oath

Millions upon millions of young men, clad in the regalia of green, red, and khaki uniforms have uttered these very words since Lord Baden Powell started the Boy Scouts of America.[1] From its beginning, the Boy Scouts of America has made a long and successful impact on countless boys from all backgrounds based on its teachings and beliefs. Countless presidents, congressmen, governors, and business leaders were members of the organization that today boasts a membership of over three million young men. So why has this seemingly innocent and positive organization received an inordinate amount of publicity within the past year?

What made national headlines was the Boy Scouts' visit to the U.S. Supreme Court. This was not a jamboree, field trip, or community service outing to our nation's superior court; this was a courtroom battle with significant First Amendment implications. In its final session in June 2000, the Supreme Court handed down the controversial decision of *Boy Scouts of America v. Dale*.[2] The issue in the *Dale* case was whether New Jersey's public accommodation law violated the Boy Scouts' First Amendment expressive-association rights by allowing an openly gay man to remain an assistant scoutmaster of the organization. The *Dale* case is one of many in recent decades dealing with the Boy Scouts' exclusion of members with views contrary to those of the organization.[3] But unlike other recent cases, the complexity of the *Dale* decision arises from the inherent tension in our constitutional system between the interest of combating sexual-preference discrimination and the right of expressive association.[4]

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1. BOY SCOUTS OF AM., HANDBOOK FOR SCOUTMASTERS: A MANUAL OF LEADERSHIP (3d ed. 1938).
2. 530 U.S. 640 (2000).
3. *See* Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993) (involving exclusion of boy and father from Boy Scouts due to their refusal to profess a belief in God); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998) (involving denial of leadership position to an avowed homosexual); Seabourn v. Coronado Area Council, 891 P.2d 385 (Kan. 1995) (involving denial of adult-leadership position for refusal to profess belief in a supreme being).
4. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68,

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This note will argue that New Jersey's interest in eradicating sexual-preference discrimination was not compelling and ultimately infringed on the Boy Scouts' First Amendment right to exclude certain members from the organization. In addition, the Boy Scouts of America is not a place of public accommodation because the New Jersey statute specifically exempts private organizations from the reach of its law. The first part of this note provides a brief history of expressive association and the Supreme Court's analysis of this First Amendment right in prior case law. Part II examines the *Dale* opinion, including arguments raised by the dissent. Part III analyzes the Court's opinion, considering New Jersey's broad public accommodation statute, the Boy Scouts' expressive-association claims, and the state interest of eradicating discrimination. Part IV discusses the possible legal and social effects the decision may have on similar private organizations and on this established right of the First Amendment. The note concludes, as did the Supreme Court, that forcing the Boy Scouts to include homosexual leaders violated its right of expressive association.

I. The Roots of Expressive Association

From its birth, America has long embraced, if not encouraged, the joining of people with common interests, goals, ideals, and beliefs in a multitude of settings. Numerous political philosophers and scientists have found that the development of these personal bonds in social, business, and charitable settings provides tremendous benefits to Americans and to the general health of society. Alexis de Tocqueville said that "the most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore, the right of association seems to me by nature almost as inalienable as individual liberty."[5] Recognizing this natural and inalienable right, the Supreme Court found that Americans and their associations should receive constitutional protection.

A. The Establishment of the Right of Association

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to protest the Government for redress of grievances."[6] Nowhere in the text of this amendment are the words "freedom of association," yet the Supreme Court has continually recognized that the Constitution is designed to secure individual liberty and therefore must preserve and protect personal relationships from government intrusion.[7] According to the Court, because associational interests reflect personal identity and autonomy, they are an inseparable component of individual liberty.[8]

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69 (1986).

5. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 178 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Rowe 1966) (1840).

6. U.S. CONST. amend I.

7. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

8. *Id.*

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In *NAACP v. Alabama ex rel. Patterson*, the Court first recognized an unfettered constitutional right of expressive association.[9] The Court held, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[10] The Court found that forcing the NAACP to disclose membership lists to the State's Attorney General would adversely affect the organization's ability to foster beliefs and would dissuade people from joining based on the fear that their beliefs might be exposed.[11] In formulating this decision, the Court placed great importance on the relationship between the freedom to associate and privacy in one's associations.[12] More importantly, the Court determined that any action by the State that might hinder or curtail the freedom to associate should be subject to the closest scrutiny.[13]

The *Patterson* case established the protected right of association but did not address discrimination. More recent Supreme Court cases have uncovered an inherent conflict between the freedom to associate and the state interest of promoting other social values. In *Runyon v. McCrary*, the Court faced the issue of whether a private school could deny admission to students solely based on race.[14] The school argued that based on the principles enumerated by the Court in *Patterson*, parents have a First Amendment right to send their children to schools that promote segregation.[15] The Court held that even though private discrimination may be a form of expressive association, such exercise has "never been accorded affirmative constitutional protection."[16] Even though parents do have a constitutional right to send their children to the school of their choice, the Court determined that parents do not have a constitutional right to provide their children with a private-school education that is free from government regulation.[17] *Runyon* clearly held that the government has a compelling interest in preventing discrimination on the basis of race in membership selection involving publicly available organizations.

Though associations have protection under the First Amendment to express and foster beliefs, this right is not absolute.[18] As demonstrated in *Runyon*, the Court has supported state efforts to curb discrimination and promote equal access to

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9. 357 U.S. 449 (1958).

10. *Id.* at 460. The Supreme Court found that the First Amendment rights of peaceful assembly and to petition the government for grievances were plainly intended to bring expressive association within the ambit of constitutional protection. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

11. *Patterson*, 357 U.S. at 462-63.

12. *Id.* at 462. Justice Harlan used the phrase "freedom of association" a number of times by itself and even separated it by referring to "these indispensable liberties, whether of speech, press, or association." *Id.* at 461.

13. *Id.* at 461.

14. 427 U.S. 160 (1976).

15. *Id.* at 176.

16. *Id.* (citing Norwood v. Harrison, 413 U.S. 455 (1973)).

17. *Id.* at 178.

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

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publicly available opportunities in a multitude of settings.[19] In cases involving the competing interests of expressive association and government regulation, the outcome of the Court's decision will often be determined by the standard of review used. It is well settled that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[20] However, determining what is and what is not a compelling government interest in the context of a distinctly private or quasi-private organization is often unclear. This determination places the Court in a difficult position because both interests at stake are extremely valuable and both deserve some level of constitutional protection.

B. Freedom Not to Associate and Roberts v. United States Jaycees

One of the more serious issues the Supreme Court faces with expressive association involves regulations that force an organization to accept members it does not want. The Court has held that the right to associate "plainly presupposes a freedom not to associate."[21] The right not to associate engenders problems because certain organizations offer valuable social, cultural, and political benefits but have criteria that restrict membership to select individuals.[22] In the landmark case of *Roberts v. United States Jaycees*,[23] the Supreme Court faced the issue of whether the First Amendment protected a social club's membership policy that prevented women from enjoying the same membership privileges as men. In *Roberts*, the Court examined the strength of a state statute aimed at combating gender discrimination and inquired whether the enforcement of the statute provided the least restrictive means of achieving state interests.[24]

In *Roberts*, the acting commissioner of the Minnesota Department of Human Rights sued the United States Jaycees (Jaycees), a nonprofit membership organization, based on the organization's admissions standards. The bylaws of the Jaycees allowed full and open membership to men of a certain age but did not extend memberships to women and older men.[25] The Minneapolis and St. Paul chapters of the organization began granting women regular memberships.[26] The national office imposed sanctions on these chapters for violating the bylaws and threatened to revoke their charters.[27] Members of both chapters filed charges of discrimination based on the Minnesota public accommodation statute.[28] The

19. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (barring racial discrimination in the sale or rental of property); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (upholding prohibition against racial discrimination in labor unions).

20. NAACP v. Button, 371 U.S. 415, 438-39 (1963).

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

22. Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASSOCIATION 15 (Amy Gutmann ed., 1998).

23. 468 U.S. 609 (1984).

24. Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH L. REV. 1878, 1889 (1984).

25. *Roberts*, 468 U.S. at 613.

26. *Id.* at 614.

27. *Id.*

28. *Id.* The Court cited the Minnesota public accommodation statute, which states, "It is an unfair

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Jaycees claimed the statute directly interfered with its freedom of association because its positions on public issues would have a different effect if the group was not strictly a young men's organization.

The U.S. Supreme Court used a balancing test to determine whether the Jaycees had a constitutional right to refuse membership to women.[29] The Court acknowledged that "[t]here can be no clearer example of an intrusion into the internal structure of affairs of an association than a regulation that forces the group to accept members it does not desire."[30] But in balancing the interests of the State and of the Jaycees, the Court determined that curbing gender discrimination served a compelling state interest that could not "be achieved through means significantly less restrictive of associational freedoms."[31] The Court held that prohibiting gender discrimination in places of public accommodation protects citizens from social harms.[32] Certain factors, such as the organization's size, purpose, and selectivity may be pertinent in determining whether constitutional protection should be granted.[33]

The Court invoked two primary lines of reasoning. First, the Court reasoned that a state has broad authority in creating public access rights for its citizens and that Minnesota adopted this type of broad statute that reached both public and quasi-commercial conduct.[34] The Court accepted the argument that the statute aimed to cure overbroad assumptions of gender stereotypes and to eradicate the stigmatizing injuries of sex-based discrimination.[35] The Court specifically noted, "Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."[36]

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discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion disability, national origin, or sex." MINN. STAT. § 363.03 (1982).

29. The Supreme Court applied a two-prong test that it has traditionally used in assessing the protected right of freedom of association. *See Roberts*, 468 U.S. at 618. First, the Court concluded that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. The Court regarded the freedom of association in this respect to be a "fundamental element of personal liberty." *Id.* at 618. Second, the Court concluded that, in another set of opinions, it has recognized freedom of association in the activities protected by the First Amendment: speech, assembly, religion, etc. *Id.* The Court stated that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* The issue in *Roberts* was whether the association interests of the Jaycees fit into one of these two constitutional categories. *See* Marshall, *supra* note 4, at 73. The Court ultimately found that the Jaycees did not fit into either one. *Id.*

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

31. *Id.*

32. *Id.* at 625.

33. *Id.* at 620.

34. *Id.* at 625 (citing Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 81-88 (1980)).

35. *Id.* at 625.

36. *Id.* at 626.

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Second, the Court reasoned that the Jaycees was a large, unselective group with virtually no criteria for membership selection.[37] Despite women's inability to vote or hold office, the Court determined that the women affiliated with the group attended various meetings, participated in projects, and engaged in social functions of the organization.[38] The Court determined that much of the activity central to the formation and maintenance of the Jaycees involved the participation of nonmembers.[39] Therefore, the Jaycees lacked distinctive characteristics that would afford it constitutional protection to exclude women from its organization.[40]

When the Court decided the *Roberts* case, many predicted that it would provide a framework to determine whether quasi-private organizations were vulnerable to state public accommodation laws or whether they received protection under the First Amendment.[41] But rather than creating such a test, the Court's decision included numerous subjective elements that opened the door for litigation.[42] More importantly, the opinion was undoubtedly fact specific, which limited its application. Because the ruling applied only to the Jaycees, the Court left future decisions as to whether other clubs may discriminate in the hands of lower courts to be decided on a case-by-case basis.[43]

This is evident in Justice O'Connor's concurrence, which offered a precursor to her joining of the majority opinion in the *Dale* case. Justice O'Connor drew a distinction between expressive and commercial organizations, reasoning that expressive organizations may perform the functions of "quiet persuasion, inculcation of traditional values, instruction of the young, and community service."[44] Therefore, the Court must use a different test to analyze the purpose of an association in order to determine whether it deserves First Amendment protection.[45] According to Justice O'Connor's line of reasoning, "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire

37. *Id.* at 621.

38. *Id.* The Court rejected the Jaycees' argument that allowing women into the organization would discourage its beliefs on such issues as the federal budget, school prayer, and voting rights. *Id.* at 628. In response to these claims, the Court argued that there was no substantial support to these assertions and declined to "indulge in the sexual stereotyping that underlies the appellee's contention." *Id.*

39. *Id.* at 621.

40. *Id.*

41. *See* Linder, *supra* note 24.

42. *Id.* Professor Linder argues that *Roberts* is a landmark decision that affects a wide variety of cases involving private associations. But the decision is considerably less of a landmark in that it did not mark a turning point in the law. *Id.*; *see also* Neal E. Devins, *The Trouble with* Jaycees, 34 CATH. U. L. REV. 901 (1985) (arguing that the Court issued an opinion that was directed towards the quasi-commercial nature of the Jaycees).

43. Lois M. McKenna, *Freedom of Association or Gender Discrimination?* New York State Club Association v. City of New York, 38 AM. U. L. REV. 1061, 1077 (1989).

44. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

45. *Id.*

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for self improvement."[46] Justice O'Connor's differentiation between commercial and expressive activity seems to favor organizations such as the Boy Scouts of America.

C. The Roberts Trilogy and the Hurley Decision

The principles used in the *Roberts* opinion controlled the outcomes of two other significant expressive-association cases. In *Board of Directors of Rotary International v. Rotary Club*,[47] the Court held that admitting women to the Rotary Club would not inhibit the humanitarian and social values of the organization. Similarly, in *New York State Club Ass'n v. City of New York*,[48] the Supreme Court denied a challenge by New York clubs concerning a gender-discrimination statue because the law did not burden the right of association. In these cases, known as the "*Roberts* trilogy," the Supreme Court rejected the clubs' discriminatory membership policies because they were not related to their respective "messages" and thus did not curtail their expressive activities.

The *Roberts* trilogy considers factors such as membership policies and selectivity to help define the "message" of a particular club. The Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*[49] strayed from the reasoning of the *Roberts* trilogy and sided instead with the expressive rights of the organizers of a parade.[50] In *Hurley*, the City of Boston authorized members of the Allied War Council of South Boston (Council) to sponsor the traditional St. Patrick's Evacuation Parade in 1947.[51] In 1992, a group of homosexual, lesbian, and bisexual descendants of Irish immigrants (GLIB) joined together to march in the parade to express pride in their Irish heritage as well as their sexual orientation.[52] The Council refused to allow GLIB to march in the parade.[53] As a result, the group filed a lawsuit against the individual petitioner John Hurley and the City of Boston, claiming that such prohibition violated state and federal constitutional rights and the Massachusetts public accommodations law.[54]

The U.S. Supreme Court granted certiorari on the issue of whether the forced admission of a group expressing a message contrary to that of the parade's private organizers violated the First Amendment.[55] The Court held that forcing the Council to include in the parade a message they did not wish to convey violated the

46. *Id.*
47. 481 U.S. 537, 548 (1987).
48. 487 U.S. 1, 18 (1988).
49. 515 U.S. 557, 577-78 (1995).
50. *See also* Kristine M. Zaleskas, *Pride, Prejudice or Political Correctness? An Analysis of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 29 COLUM. J.L. & SOC. PROBS. 507 (1996).
51. 515 U.S. 557 (1995).
52. *Id.* at 561.
53. *Id.* The Council denied GLIB's application in 1992, but the organization obtained a state court order requiring the parade organizers to allow them to march among the 10,000 participants. *Id.* GLIB reapplied in 1993 but the Council refused its admittance once again. *Id.*
54. *Id.*
55. *Id.* at 566.

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Council's right of expression protected under the First Amendment.[56] The Court looked beyond expression in the form of written or spoken words, noting that "symbolism is a primitive but effective way of communicating ideas."[57] Based on this reasoning, the Court stated that the overall message of the parade is communicated by each individual unit's expression to the spectators along the parade route.[58] The Massachusetts law had the effect of declaring the sponsor's speech itself to be the public accommodation.[59] Therefore, the statute forced the Council to convey an expressive message that it clearly decided to exclude.[60] Using powerful language, the Court stated that "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[61]

The *Hurley* case is important to the *Dale* decision for a number of reasons. First, the Supreme Court relied heavily on the *Hurley* analysis in holding that forcing the Boy Scouts to propound a view it does not wish to convey runs contrary to the purpose of expressive association. Second, the *Hurley* decision provides an example of a state applying its public accommodation statute "in a peculiar way" in an attempt to target discrimination.[62] Finally, the First Amendment analysis applied in *Hurley* allowed the Court to accept the argument that the Boy Scouts' right to oppose homosexual behavior was significantly burdened by the New Jersey public accommodations law.

II. Boy Scouts of America v. Dale

A. The Facts and Lower Court Rulings

James Dale joined a local troop of the Boy Scouts of America in 1981 and was an active member until the age of eighteen.[63] Dale held numerous leadership positions and achieved the rank of Eagle Scout, one of the Boy Scouts' highest honors.[64] Following high school, Dale attended college at Rutgers University where he became a member and advocate of the University Lesbian/Gay Alliance.[65] Around this time, Dale applied to become an assistant scoutmaster of a local troop, and the local council approved him for the position in 1989.[66] While at Rutgers, a newspaper photographed and interviewed Dale concerning his advocacy of homosexual teenagers' need for gay role models.[67] As a result, Dale received a

56. *Id.* at 581.
57. *Id.* at 569 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)).
58. *Id.* at 577.
59. *Id.* at 573.
60. *Id.* at 574.
61. *Id.* at 575.
62. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 658 (2000) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572 (1995)).
63. *Id.* at 644.
64. *Id.*
65. *Id.* at 644-45.
66. *Id.* at 644.
67. *Id.* at 645.

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letter from the Monmouth Council of the Boy Scouts revoking his adult membership.[68]

Dale appealed the decision, but the Boy Scouts Assistant Regional Director supported the decision of the Monmouth Council. Following more correspondence, the Boy Scouts' legal council explained that the "[BSA] does not admit avowed homosexuals to membership in the organization."[69] Dale filed a complaint claiming that the Boy Scouts violated the New Jersey public accommodation statute and the common law by revoking his position based on his sexual orientation.[70]

The New Jersey Superior Court Chancery Division granted the Boy Scouts summary judgment. The court held that the Boy Scouts of America was not a place of public accommodation as defined by the New Jersey statute because it was a distinctly private organization.[71] The court concluded that the organization was consistent in its position to exclude homosexuals because such behavior was neither "morally straight" nor "clean" according to the Scout Oath and Law.[72] Dale appealed the decision and the New Jersey Superior Court Appellate Division reversed.[73]

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68. *Id.*

69. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1205 (N.J. 1999) (alteration in original), *rev'd*, 530 U.S. 640 (2000).

70. *Id.* The New Jersey public accommodation statute states:

> 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.

N.J. STAT. ANN. § 10:5-4 (West Supp. 2000).

71. *Dale*, 734 A.2d at 1206.

72. *Id.*

73. The New Jersey Superior Court Appellate Division affirmed the dismissal of Dale's common law claim, but otherwise reversed and remanded the case for further proceedings. 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), *rev'd*, 530 U.S. 640 (2000). The appellate division held that the New Jersey public accommodation statute did apply to the Boy Scouts and the organization violated the statute by removing Dale from his position. *Id.* The appellate court rejected the Boy Scouts' expressive-association claims by concluding that allowing homosexual leaders would in no way inhibit the organization from expressing its views and beliefs. *Id.* at 289. Though the court recognized that the First Amendment protected the Boy Scouts' views, the State's compelling interest in eradicating discrimination outweighed its exclusionary policy. *Id.* at 287. The appellate court expressed a strong position on stereotypical generalizations of homosexuals:

> There is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or impart BSA humanitarian ideals to the young boys in his charge. Nothing before us even suggests that a male, simply because he is gay, will somehow undermine BSA's fundamental beliefs and teachings.

Id. at 289.

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B. The New Jersey Supreme Court Decision

The New Jersey Supreme Court affirmed the appellate division, holding that the Boy Scouts and its local councils are places of public accommodation and subject to the New Jersey statute.[74] The court determined that the removal of Dale from his position as assistant scoutmaster based on his sexual orientation ran contrary to New Jersey's compelling interest to eliminate discrimination.[75] Finally, the court held that the New Jersey public accommodation law did not infringe on the Boy Scouts' freedom of expressive association despite arguments that the Scout Oath and Law implicitly stood against the immorality of homosexuality.[76]

C. The Supreme Court Ruling

The U.S. Supreme Court granted certiorari on the issue of whether the application of the New Jersey public accommodation statute violated the Boy Scouts' freedom of expressive association.[77] Chief Justice Rehnquist delivered the opinion of the Court, which reversed the New Jersey Supreme Court based on four key holdings. First, the Court held that the application of the New Jersey public accommodation statute was overly broad.[78] The Court found that certain places included in the New Jersey statute were traditionally private in nature.[79] The Court concluded that the Boy Scouts is a distinctly private organization and therefore the New Jersey statute did not apply.[80] The Court recognized cases allowing states to apply public accommodation laws to eradicate discrimination in private organizations, but

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74. *Dale*, 734 A.2d at 1218. The New Jersey Supreme Court declined to construe "place" to include only those membership associations attached to a specific facility or geographic location. *Id.* at 1210. Additionally, in examining "public accommodation," the court found a close nexus between the Boy Scouts and the President, the military, public schools, and other federal government departments. *Id.* at 1212. The Boy Scouts argued that it was exempt under certain exceptions to the New Jersey statute, but the court rejected these arguments, stating that the Boy Scouts was not distinctly private nor was it an educational facility operated by a religious institution. *Id.* at 1213-17.

75. *Id.* at 1227. In support of its assertion that New Jersey had a compelling interest in eradicating discrimination, the court discussed the intent and purpose of the New Jersey legislature in amending the public accommodation statute to include "affectional or sexual orientation." *Id.* The court found an implicit recognition in the statute that the "archaic" and "stereotypical notions" of homosexuality that bear no relationship to reality could not be tolerated. *Id.*

76. *Id.* at 1225. The New Jersey Supreme Court determined that the statute did not violate the Boy Scouts' freedom of expressive association because Dale's inclusion would not significantly impact members' abilities to associate with one another in pursuit of shared views. The court reasoned that members do not meet for the sole purpose of conveying the message that homosexuality is immoral. *Id.* at 1223.

77. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

78. *Id.* at 657.

79. *Id.* The U.S. Supreme Court argued that many "public" places on the New Jersey listing included restaurants, retail shops, public libraries, and other areas that one would expect to be places of public invitation. *Id.* But in the same statute, the Court found locations that often did not carry an open invitation to the public. *Id.*

80. *Id.* at 657. The Court expressed concern that attaching public accommodation laws to private organizations would create an increasing conflict with First Amendment rights of organizations. *Id.*

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concluded that in these instances, enforcement of the statutes did not materially interfere with the expressed ideas of the organization.[81]

Second, the Court found that the inclusion of Dale would significantly alter the Boy Scouts' ability to advocate certain public and private beliefs.[82] The Court used the *Hurley* decision to support this point. Just as the presence of the GLIB organization in the St. Patrick's Day parade interfered with the parade organizers' message, the presence of Dale as an assistant scoutmaster would equally interfere with the Boy Scouts' belief that homosexuality is inconsistent with the values it promotes for its youth members.[83] The Court relied on official position statements by the Boy Scouts concerning the exclusion of homosexuals as adult leaders.[84] The dissent argued that these position statements were merely the adoption of an exclusionary membership policy. However, the majority was sensitive to this concern, stating that expressive associations cannot simply create discrimination shields by claiming that mere acceptance of a member would impair the organization's message.[85] The Court reasoned that, in this case, Dale's advocacy of gay issues and his leadership in the gay-rights movement would force the Boy Scouts to send a message that it accepts homosexual conduct as a legitimate form of behavior.[86]

Third, in response to Dale's assertion that various members of the Boy Scouts may subscribe to different views regarding homosexuality, the Court held that the "First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"[87] Organizations do not have to associate merely for the "purpose" of disseminating a particular message in order to seek protection under the First Amendment; an association is entitled to protection if it engages in expressive activity that could be impaired.[88] Additionally, the Court held that the Boy Scouts' members did not have to meet for the purpose of propounding the belief that homosexuality was immoral

81. *Id.* The Court relied on reasoning from *Roberts v. United States Jaycees*, 468 U.S 609 (1984).

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

83. *Id.*

84. *Id.* at 651. The Supreme Court relied on position statements concerning homosexuality made by the Boy Scouts on numerous occasions. These included an official position in 1978 issued by the President of the Boy Scouts and one issued in 1991 after Dale's membership was revoked. *Id.* at 651-52. In addition, the Court found evidence of the Boy Scouts' position in previous litigation. *Id.* at 653 (citing Curran v. Mount Diablo Council of Boy Scouts of Am., 952 P.2d 218 (Cal. 1998)). The Court accepted the Boy Scouts' assertions, claiming that to doubt its sincerity would ignore such written evidence. *Id.* at 652-53.

85. *Id.* at 653.

86. *Id.*

87. *Id.* at 655. In a footnote, the Supreme Court expressed doubt as to this assertion by Dale. During the trial, the National Director of the Boy Scouts certified that "any persons who advocate to Scouting youth that homosexual conduct is consistent with Scouting values will not be registered as adult leaders." *See id.* at 655 n.1.

88. *Id.* at 655. The Court used the *Hurley* case as an illustration. The purpose of the parade in *Hurley* was not to express the belief that homosexuality was immoral, but the parade organizers had a right to exclude certain participants nonetheless. *Id.*

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in order to receive First Amendment protection.[89] The Court reasoned that a homosexual in an assistant scoutmaster's uniform sends a plainly different message than the presence of a heterosexual assistant scoutmaster who disagrees with the Boy Scouts' policy.[90] The Court added:

> The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment Protection.[91]

Finally, the Court held that New Jersey's interest in combating discrimination based on sexual orientation through public accommodation laws did not "justify . . . a severe intrusion on the Boy Scouts' right[s] . . . of expressive association."[92] A state cannot apply its public accommodation law to impose such a requirement because doing so violates the First Amendment, which "protects expression, be it . . . the popular variety or not."[93] The Court recognized in *Roberts* and *Duarte* that states have a compelling interest in eliminating gender discrimination, but in these cases, enforcing the public accommodation statutes did not materially interfere with the respective messages of these groups.[94] Considering the message of the Boy Scouts, the Court held that the state interest embodied in the New Jersey public accommodation statute was not justified due to the severe intrusion on the Boy Scouts' freedom of expressive association.[95]

D. Justice Stevens' Dissent

Justice Stevens argued that nothing in the Boy Scouts' policy statements established any clear, consistent, and unequivocal position concerning the group's view of homosexuality.[96] Relying heavily on *Roberts*, the dissent found the inclusion of homosexuals would not "impose any serious burden" or be a "restraint upon" the Boy Scouts' "shared goals" of fostering its beliefs.[97] The dissent argued

89. *Id.*

90. *Id.* at 656.

91. *Id.*

92. *Id.* at 659. In support of this position, the Court referred to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

93. *Dale*, 530 U.S. at 660 (citing Texas v. Johnson, 491 U.S. 397 (1989) (reversing a conviction for burning an American flag because it violated the First Amendment) and Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that conviction of a Ku Klux Klan member for advocating political reform violated the First Amendment)).

94. *Id.* at 657-58.

95. *Id.* at 659.

96. *Id.* at 677 (Stevens, J., dissenting). The dissent argued that "morally straight" and "clean" do not indicate the Boy Scouts' view on homosexuality. *Id.* at 668 (Stevens, J., dissenting). In the dissent's view, "The idea that homosexuality is not 'appropriate' appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA." *Id.* at 673 (Stevens, J., dissenting).

97. *Id.* at 665 (Stevens, J., dissenting) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 626-627

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that the Boy Scouts simply adopted a policy of exclusionary membership without a consistent goal of disapproving homosexual behavior.[98] Justice Stevens argued that the majority opinion reinforced the idea that homosexuals are simply different from the rest of society and are irreversibly affixed with the homosexual label.[99] Refuting this reasoning, Justice Stevens called attention to the country's wider acceptance, greater understanding, and change in attitude regarding homosexuality.[100] But he added that prejudices remain and their "harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."[101]

III. The Analysis and Implications of the Dale Decision

A. New Jersey's Liberal Public Accommodation Statute

Before analyzing the Boy Scouts' expressive-association claims, it is important to discuss the roles of state and federal judiciaries in interpreting public accommodation laws. State public accommodation laws have historically been more effective at fighting discrimination than federal public accommodation laws[102] because states have the ability to enact laws that extend beyond the federal government's Commerce Clause powers.[103] Through their police power, states can broaden statutory coverage to include a variety of locations and to include various forms of discrimination based on age, disability, marital status, and sexual orientation.[104] The Supreme Court's limitation on what constitutes a place of public accommodation has largely been based on statutory interpretation rather than constitutional interpretation.[105] Nonetheless, the Court has made it clear that neither the Commerce Clause nor state public accommodation laws are free from the restrictions of the Constitution.[106] The *Dale* case accentuates the tension

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(1984)). In addition to citing *Roberts*, the dissent disagreed with the majority's application of the *Hurley* reasoning in the *Dale* case. The dissent stated that unlike *Hurley*, Dale's participation in the Boy Scouts "sends no cognizable message to the Scouts or to the world" *Id.* at 694 (Stevens, J., dissenting). The dissent argued that if there was any type of message being conveyed, it was the act of Dale joining the Boy Scouts. *Id.* at 695 (Stevens, J., dissenting). "Such an act does not constitute an instance of symbolic speech under the First Amendment." *Id.*

98. *Id.* at 684 (Stevens, J., dissenting).

99. *Id.* at 696 (Stevens, J., dissenting).

100. *Id.* at 699-700 (Stevens, J., dissenting). In addressing the argument that homosexuality is becoming more acceptable in American society, the majority replied, "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Id.* at 660.

101. *Id.* at 700 (Stevens, J., dissenting).

102. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 287 (1978).

103. *See* Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1052 (1985).

104. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572 (1995).

105. *See* Griffin, *supra* note 103, at 1053.

106. *Id.*

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between the interpretation of what is public and what is distinctly private. However, unlike previous cases in which the Supreme Court has given deference to states' compelling interests, the Justices in the *Dale* case determined that the New Jersey statute infringed upon the constitutionally protected rights of a private organization. In essence, the Court held that the New Jersey statute's inclusion of the Boy Scouts as a place of public accommodation stretched the law too far and ultimately damaged the Boy Scouts' First Amendment rights.

The Supreme Court correctly questioned the New Jersey decision for two reasons. First, New Jersey applied a public accommodation statute to a distinctly private organization. States typically define what is "distinctly private" in their public accommodation statutes to distinguish those organizations formed to enhance business opportunities.[107] When a statute does not include a definition, the Court must examine the organization's characteristics, including its selectivity of membership, size, purpose, policies, and other factors that may be important on a case-by-case basis.[108] The New Jersey statute states specifically that "nothing herein contained shall be construed to include . . . any institution, bona fide club . . . which is in its nature distinctly private."[109] Though the New Jersey legislature provided a long list of definitions, it failed to define what constituted a "distinctly private" organization.[110] Therefore, the Supreme Court had wide latitude in deciding whether the Boy Scouts should be classified as a distinctly private organization.

In determining whether the Boy Scouts was "distinctly private," the New Jersey Supreme Court concluded that selectivity in membership is "the principal determinant of a 'distinctively private' status."[111] The New Jersey court claimed that the Boy Scouts was not private because (1) membership to the organization was not restricted, and (2) merely reciting the Scout Oath and Law did not operate as genuine selectivity criteria.[112] The Supreme Court's concern with the New Jersey

107. Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs* 2 MICH. J. GENDER & L. 27, 50, 54 (1994).

108. Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984). State courts use various criteria to define "distinctly private," but many have traditionally defined such organizations as follows:

> an organization (1) formed because of a common associational interest among the members; (2) which carefully screens applicants for membership and selects new members with reference to the common intimacy of association; (3) which limits the facilities or the services of the organization strictly to members and bona fide guests; (4) which is controlled by the membership in general meetings; (5) which limits its membership to a number small enough to allow full membership participation and to ensure that all members share the common associational bond; (6) which is non-profit and operated solely for the benefit of the members; and (7) whose publicity, if any, is directed only to members for their information.

Wright v. Cork Club, 315 F. Supp. 1143, 1153 n.21 (S.D. Tex. 1970).

109. N.J. STAT. ANN. § 10:5-5 (West Supp. 2001).

110. *Id.*

111. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1214 (N.J. Sup. Ct. 1999) (citing U.S. Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1204 (N.Y. 1983)), *rev'd*, 530 U.S. 640 (2000).

112. *Id.* at 1216. The New Jersey court pointed to the Boy Scouts' large membership, arguing that

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court's analysis is not surprising. Foremost, the Court recognized the dangers of expanding state public accommodation laws to include noncommercial entities such as the Boy Scouts. Justice O'Connor articulated the significance of this distinction in her concurrence in *Roberts*. O'Connor found that expression may be protected if it takes the form of "quiet persuasion, inculcation of traditional values, instruction to the young, and community service."[113]

This argument plainly applies to the Boy Scouts of America. The Boy Scouts is a nonprofit, noncommercial organization with a mission of instilling traditional values and morals into young men. This mission creates a common intimacy of association and allows the transmission and cultivation of shared ideals among scouts and their adult leaders.[114] Boy Scout troops are small, intimate organizations whose members engage in camping, hiking, and other outdoor activities that take place away from the general public.[115] These experiences together create a greater degree of intimacy among the Boy Scouts' membership than the intimacy generated by the formal meetings and general purposes of the Jaycees, Rotary, or Kiwanis clubs.[116]

Determining whether an organization is expressive or commercial is paramount: those organizations characterized as commercial are subject to rationally related state regulation, but those associations predominantly engaged in protected expression are sheltered from government intrusion under the First Amendment.[117] The Court correctly concluded that the Boy Scouts is an intimate, private organization far removed from commercial activities that would prevent it from receiving constitutional protection. In essence, New Jersey stretched the ordinary meaning of certain words in its public accommodation statute in order to apply it liberally to the Boy Scouts. This attempt, when analyzed under the commercial/noncommercial dichotomy, ultimately failed because the Boy Scouts is a distinctly private organization that should be afforded full First Amendment protection.

Second, the New Jersey public accommodation statute should not apply to the Boy Scouts because the statute neglected to "tie the term 'place' to a physical

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since its inception, there have been over eighty-seven million adults who have joined the organization. *Id.* Additionally, the court reasoned that merely reciting the Scout Oath and Law presented "no real impediment to joining" the organization and did not "function as true limits on the admission of members" because there was no evidence that the Scout Oath and Law were used to exclude a prospective member. *Id.*

113. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

114. Brief for Petitioner at 40, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

115. A typical Boy Scout troop consists of fifteen to thirty members. When a boy joins a troop, he is assigned to a patrol that consists of three to eight boys. The patrol has a name, flag, and leader who encourages the scouts to act as a team. The scouts also wear a distinctive uniform that contains emblems and signifies rank. "The uniform gives the boy a sense of identity with other Boy Scouts and with Boy Scout values, and reminds him that he is expected to live up to these values." *Id.*

116. The Jaycees chapters at issue in *Roberts* had a membership of more than four hundred members and the Rotary chapters in *Duarte* ranged from twenty to more than nine hundred members. *Id.*

117. *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring).

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location."[118] The jurisdictions that have discussed whether the Boy Scouts constitutes a "place" under a public accommodation statute have found that it does not fall under the reach of their laws.[119] For example, in *Welsh v. Boy Scouts of America*,[120] the Seventh Circuit held that the purpose of scouting centers on the fellowship and moral socialization of young men, as compared to the general admission into a hotel, restaurant, or theater. The Supreme Court of California concluded in *Curran v. Mount Diablo Council of the Boy Scouts of America*[121] that the Boy Scouts was a "small group" and simply did not fall into the category of traditional places of public accommodation. Lastly, the Kansas Supreme Court held in *Seabourn v. Coronado Area Council, Boy Scouts of America*[122] that the Boy Scouts is not a place of public accommodation because troops meet outside the public view and are not a business open to the general public. Significantly, until the New Jersey Supreme Court's decision, no federal appellate court or state supreme court had found the Boy Scouts to be a "place" of public accommodation.[123] These jurisdictions refused to read their public accommodation statutes in such a broad and sweeping manner.

The Boy Scouts of America cannot be a "place" of public accommodation because the organization is simply not connected to a particular geographic location or facility. The respondent claimed that Boy Scout troops conduct meetings in schools and in other public places that have direct ties to state and federal governments. This proposition is a mischaracterization of the facts. Nearly 65% of Boy Scout troops congregate in and are sponsored by local churches, synagogues,

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118. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

119. *See* Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1274 (7th Cir. 1993); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 238 (Cal. 1998); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987); Seabourn v. Coronado Area Council, 891 P.2d 385, 392 (Kan. 1995); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976).

120. 993 F.2d 1267, 1274 (7th Cir. 1993). In *Welsh*, the Seventh Circuit determined whether a Boy Scout troop could exclude a member who refused to profess a belief in a supreme being. *Id.* The issue was whether the Boy Scouts violated Title II of the 1964 Civil Rights Act, which prohibits discrimination against religion in places of public accommodation. The Court concluded that Congress "never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of public accommodation." *Id.* at 1269. Congress specifically intended to regulate facilities rather than the gatherings of people. *Id.* The *Welsh* court succinctly stated, "The Boy Scouts is as different from the facilities listed in Title II as dogs are from cats." *Id.* at 1270.

121. 952 P.2d 218, 238 (Cal. 1998). In *Curran*, the Supreme Court of California held that the Boy Scouts is an expressive social organization whose primary purpose is to instill values into young men. The court determined that the small-group structure and activities were not comparable to traditional places of public accommodation. *Id.*

122. 891 P.2d 385, 392 (Kan. 1995). The *Seabourn* court concluded that a public accommodation, according to the Kansas Act Against Discrimination, includes places of business that are open to the general public. The court held that the Boy Scouts is not an organization whose membership is open to the public because membership is limited to a certain age group and members must pledge the Scout Oath and Law. *Id.* The Kansas Supreme Court refused to accept an overbroad reading of the statute because the relationships in scouting are "continuous, personal, and social and take place, more or less, outside of public view." *Id.* at 406.

123. *Dale*, 530 U.S. at 657 n.3.

and other religiously affiliated facilities.[124] Additionally, more than 25% are chartered by private institutions in local communities. In fact, public institutions such as schools sponsor fewer than 10% of troops.[125] These statistics support the conclusion that the Boy Scouts is simply not associated with "places" that involve government sponsorship.

Because Boy Scout troops associate in a variety of locations that are mainly private in nature, New Jersey's attempt to tie the Boy Scouts to a "place" of public accommodation is a broad stroke of statutory law. The New Jersey courts conceded that in order to eradicate discrimination, the provision of the New Jersey statute should be "construed liberally to effectuate that purpose."[126] However such a liberal interpretation infringed upon the association rights of the Boy Scouts to advocate its stance on homosexual leadership. The decision signals that liberally construed public accommodation laws without proper and sufficient definitions will face scrutiny if applied to private organizations such as the Boy Scouts.

B. Applying the New Jersey Law Imposes a Serious Burden on the Boy Scouts' Expressive Rights

The pivotal question in the *Dale* case was whether the government should be able to interfere with the Boy Scouts' expressive rights in order to combat discrimination based on sexual orientation. Few would argue that the government does not have some interest in preventing certain types of discrimination among citizens. As demonstrated in prior Supreme Court decisions, the government may restrict organizations from gender-based discrimination when the message or belief of the organization is not impaired. But this interest has limitations when the message of an organization is impaired. In *Dale*, the Supreme Court employed a balancing test by placing the association interests of the Boy Scouts on one side of the scale and the State of New Jersey's interests on the other. The Supreme Court found that New Jersey's interest in eradicating discrimination based on sexual orientation suffocated the Boy Scouts' right to oppose homosexual leadership.[127] This decision correctly follows Supreme Court precedent for the following reasons.

First, the analysis and reasoning used in *Roberts* to reject an expressive-association claim do not apply to the Boy Scouts. Though the Boy Scouts is a large, inclusive organization, the membership criteria employed is distinctly selective. Boys wanting to join must be of a certain age and must promise to live by and uphold the Scout Oath and Law. There was no evidence in *Roberts* showing that the admittance of women would significantly affect the symbolic message of the Jaycees.[128] But the Boy Scouts provided evidence showing that allowing a homosexual to be an assistant scoutmaster would dramatically affect the moral

124. Brief for Petitioner at 3, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

125. *Id.*

126. Dale v. Boy Scouts of Am., 706 A.2d 270, 279 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

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

128. Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984).

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codes and beliefs that every scout and adult leader pledge to uphold. This is evident in the *Scoutmaster's Handbook*, which emphasizes the duties required of scout leaders:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons
>
> . . . .
>
> What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.[129]

The fact that Dale was not only homosexual, but that he participated in homosexual organizations and spoke openly concerning homosexual rights is, according to the Boy Scouts, antithetical to the moral responsibilities of a Boy Scout leader in guiding, training, and providing a role model to young men. Altogether, the intimate relationship between a scoutmaster and the boys he leads exhibits far more qualities deserving of constitutional protection than the activities of a civic organization such as the Rotary or Jaycees.[130] The Boy Scouts has long adhered to a core set of values it expects and requires from its adult leaders. It has provided position statements expressing that homosexuality is inconsistent with these goals and values.[131] Forcing the Boy Scouts to do otherwise would "impair the ability of the original members to express only those views that brought them together."[132]

The dissent argued that the Boy Scouts provided weak evidence proving that it had a stance concerning homosexual leaders and criticized the majority for not requiring more evidence verifying its assertions. This argument is weak because it ignores the possibility that the Boy Scouts did not anticipate that such formalistic assertions would be needed until Dale brought suit against it.[133] Justice Stevens might have been satisfied had the Boy Scouts dedicated a section of its handbook to homosexuality with phrases such as "homosexuality is inconsistent with the morals and values of the Boy Scouts" or "no Boy Scout or Boy Scout leader can be homosexual." Courts should not hold organizations to this strict standard of proof. Organizations should not have to explicitly state every value-defining choice in their handbooks in order to avoid legal challenges to their membership decisions.

Second, it is not the role of the government to decide the message of a private organization. The Boy Scouts of America has a First Amendment right to choose adult leaders who will uphold the values the organization wishes to convey without the threat of lawsuits. The Boy Scouts selects its leaders based on the important role they play in building the character of young men. Allowing the government to

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129. *Dale*, 706 A.2d at 276 (alteration in original) (quoting the 1972 *Scoutmaster's Handbook*).

130. *See* Paul Varela, *A Scout Is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM. & MARY L. REV. 919, 943 (1989).

131. *See supra* note 84.

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

133. *See* Peter H. Schuck, *Diversity Demands Exclusivity*, AM. LAW., Sept. 12, 2000, at 67.

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second guess these decisions would "essentially requir[e the Boy Scouts] to alter the expressive content of their [organization]."[134] Civic organizations play a powerful role in American society by giving people the ability to foster personal beliefs and ideas. The government does not have the right to infringe on this ability merely because it disagrees with the message. As the Court in *Hurley* stated, the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one."[135] In the absence of some further legitimate end, the government simply cannot force the Boy Scouts to alter its expressed ideas and beliefs by allowing an openly homosexual assistant scoutmaster.

IV. The Effects of the Dale Decision

A. The Legal Implications

Though the Court viewed New Jersey's interpretation of its public accommodation statute as overly broad, this does not diminish the compelling government interest states have in eradicating discrimination. Each state may, for the most part, adopt its own definition of "place of public accommodation."[136] The public accommodation statutes of one state may deem an organization to be public while another state may classify it as private.[137] The *Dale* decision does not take away a state's reserved police power to control its public accommodation statutes, but it does signal that the preferred rights of the First Amendment will prevail when a state has overstepped constitutional boundaries.

The Court clearly did not advocate a position for or against the morality of homosexuality. However, the Court did provide a clear distinction between discrimination based on sexual preference and that based on race, gender, national origin, or ethnicity in quasi-private organizations. Though the issue in *Dale* does not involve homosexual rights under the Fifth and Fourteenth Amendments, the majority in *Dale* appeared to embrace the position in *Bowers v. Hardwick*[138] that eradicating discrimination against historically protected groups stops short of protecting homosexuals. The Court found that states do not have a compelling interest to prevent discrimination based on sexual orientation.[139] Thus, it appears that certain quasi-private organizations may discriminate so long as the discrimination does not infringe upon the rights of a protected class of persons. When the discrimination does infringe on the rights and privileges of a protected class, such as the rights of the women excluded in the *Roberts* trilogy, the Court will support the public accommodation law embracing the state interest in eradicating such discrimination.

The dissent argued that homosexuality is becoming more widely accepted in American society and that allowing the Boy Scouts to discriminate against

134. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572-73 (1995).
135. *Id.* at 579.
136. *See* Varela, *supra* note 130, at 934.
137. *Id.*
138. 478 U.S. 186 (1986).
139. *Id.*

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homosexuals perpetuates the stereotype that such behavior is immoral and wrong.[140] Following the decision, a number of leaders and organizations agreed with Justice Stevens and heavily criticized the Boy Scouts for fostering discrimination against homosexuals. In September 2000, U.S. Representative Lynn Woolsey introduced a bill to revoke the Boy Scouts' congressional charter dating from 1916.[141] Woolsey stated, "[T]here is nothing charitable or patriotic about intolerance."[142]

Woolsey's arguments miss the point for several reasons. First, this case is not about whether the Court or the government agrees or disagrees with the Boy Scouts' policy. As previously discussed, the Boy Scouts has an admission policy requiring each member to pledge to certain codes and behavior; actions contrary to these promises are "antithetical to the organization's goals and philosoph[ies]."[143] The Supreme Court would have reached the same conclusion had an atheist been denied membership because an atheist's views run contrary to the expressed beliefs of the Boy Scouts. The *Dale* case protects an organization from government intrusion when such interference clashes with the group's fundamental message.

Second, the Court should not hastily modify established law merely because attitudes have changed and people are more accepting of certain beliefs. Though the New Jersey statute provides homosexuals protection from discrimination in a broad range of locations, homosexuals have not been afforded constitutional protection under the Fourteenth Amendment.[144] The forced inclusion of an unwanted person that runs contrary to the core beliefs and values of a group directly affects the groups' expressive rights and prohibits them from advocating certain viewpoints.[145] The attitudes of American citizens concerning social values should not sway the Court from granting or denying First Amendment protection, be it the popular variety or not.[146] This premise is vital to the very infrastructure of American civic and private organizations because it protects them from government interference and intrusion. The *Dale* case stands for the idea that organizations can foster certain beliefs without having to "tiptoe" around the prospect of lawsuits. Foremost, the case prevents a chilling effect on organizations' First Amendment rights to choose their members, engage in activities, and associate with others in pursuit of social and cultural ends.

B. The Social Effects

The Supreme Court's decision has created a number of problems concerning the role of the federal government and its relationship with the Boy Scouts of America.

140. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 700 (2000) (Stevens, J., dissenting).

141. *See* Carolyn Lochhead, *Bill to Sanction Boy Scouts Faces Likely Defeat Today*, S.F. CHRON., Sept. 13, 2000, at A3.

142. *Id.*

143. *Dale*, 530 U.S. at 651.

144. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

145. *Dale*, 530 U.S. at 648 (citing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)).

146. *Id.* at 660.

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Following the decision, President Clinton issued an executive order prohibiting discrimination on the basis of sexual orientation in federally funded education and training programs.[147] This created controversy when the Interior Department sought guidance from the Justice Department on how the order might affect its dealings with the Boy Scouts. Janet Reno declared that "Boy Scout Jamborees are not federally conducted education or training programs."[148] Reno stated that President Clinton's order "does not apply to private organizations that may use federal lands for their own training programs."[149] The Justice Department said that other types of federal assistance, including assistance with conservation merit badges or awards, would be allowed as long as the Boy Scouts and not the federal government sponsored the activity.[150]

Unfortunately, this was just the beginning of the problems the Boy Scouts faced because of its policy on homosexual leadership. Charities have begun to reconsider providing funding to the Boy Scouts.[151] Numerous chapters of the United Way, which give the organization over $8.7 million a year, have ended or reduced their donations to local troops.[152] Across the United States, government leaders and cities are retracting their support of the organization. The publicity surrounding the *Dale* decision has certainly produced an unfortunate result for an organization whose goal is to instill morals, values, citizenship, and integrity into the hearts and minds of America's young men. In response to the criticism and funding controversies, Gregg Shields, a spokesman for the Boy Scouts, stated, "We do not force our values and our opinions on anyone. It's a choice that is open to anyone, and we simply ask other people who disagree with us to tolerate and respect our values and our beliefs."[153] America does not have to respect the policies of the Boy Scouts, but it must respect the Constitution, which provides First Amendment rights of expressive association to those organizations who seek legitimate protection.

Conclusion

We live in a society that prides itself on its diversity and on its commitment to certain inalienable rights and inseparable freedoms. Our Constitution protects the fundamental right of a private organization to freely express the beliefs, ideas, and values it wishes to convey. The freedom to associate in order to promote these shared values presupposes "the freedom to identify the people who constitute the association, and to limit the association to those people only."[154] The very concept of expressive association assumes a group of like-minded individuals associating for

147. *See* Associated Press, *Boy Scouts OK on Federal Lands*, TULSA WORLD, Sept. 2, 2000, at A8.
148. *Id.*
149. *Id.*
150. *Id.*
151. *See* Laura Parker, *Boy Scout Troops Lose Funds, Meeting Places*, USA TODAY, Oct. 10, 2000, at A1.
152. *Id.*
153. *Id.*
154. Democratic Party v. Wisconsin, 450 U.S. 107, 122 (1981).

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promoting such values and philosophies.[155] It would be contrary to our democracy for the government to force an organization to accept a member or promote a belief that contradicted its stated core beliefs, morals, and values.

The Boy Scouts of America is a private organization that quietly and effectively teaches young men the importance of mental strength, traditional values, and moral well being. The Boy Scouts sufficiently proved that allowing homosexuals to become adult leaders would violate the professed values and beliefs the organization fosters. To infringe upon these beliefs would force the Boy Scouts to convey a contrary message. The Supreme Court's decision in *Dale* correctly followed precedent and properly applied such law to support the Boy Scouts' right to expressly choose its leaders. Though states have the power to enact public accommodation laws, these laws cannot infringe upon constitutional protections. Though controversial, the *Dale* case will ultimately protect the rights and privileges of distinctly private organizations to freely foster their ideas and beliefs without the threat of government interference.

J. Craig Buchan

155. *Id.*

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