FIRST AMENDMENT - FREEDOM OF EXPRESSIVE ASSOCIATION - THE NEW JERSEY LAW AGAINST DISCRIMINATION'S PROHIBITION AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IS UNCONSTITUTIONAL AS APPLIED TO AN ORGANIZATION THAT PURPORTS TO VIEW HOMOSEXUALITY AS IMMORAL AND BARS HOMOSEXUALS FROM PARTICIPATION - *BOY SCOUTS OF AMERICA V. DALE*, 120 S. CT. 2446 (2000).

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The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country. The human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.[1]

I. INTRODUCTION

The right to freedom of association is "an indispensable means of preserving other individual liberties."[2] The Supreme Court has recognized the existence of that right based on various other enumerated rights, such as freedom of speech, that cannot take effect without a parallel associative right.[3] The right to freedom of association has been included in "the bundle of First Amendment rights" applied to the states by the Due Process Clause of the Fourteenth Amendment.[4] Also, the Court has noted the vital necessity of associative rights in protecting the political participation of minority groups.[5] The right to freedom of association also encompasses the freedom *not* to associate, which enables organizations

[1] Boy Scouts of Am. v. Dale, 734 A.2d 1196, 1227 (N.J. 1999) (footnote omitted).

[2] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

[3] *Id.*

[4] 16 AM. JUR. 2D *Constitutional Law* § 539 (2000) (citing Democratic Party of U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)).

[5] Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2451 (2000) (citing *Roberts*, 468 U.S. at 622).

to exclude members whose presence would interfere with those organizations' opportunities to express their viewpoints.[6] Thus, when the admittance of a person to an organization would threaten that organization's expressive integrity, the freedom of expressive association allows that organization to exclude such a person.[7]

However, states can impose limits on the freedom not to associate if those limits do not significantly affect the expressive message of the organization, or if a compelling state interest, unrelated to the suppression of free speech, justifies an infringement on the organization's associative rights.[8] In many cases, these limits take the form of state antidiscrimination laws that prohibit the exclusion of minority groups from public accommodations.[9] Public accommodations laws seek to end invidious discrimination by requiring organizations that serve the public to open their services and facilities to all without regard for a person's race, gender, or other status.[10] Recently, states have expanded their antidiscrimination protections to include additional types of public accommodations as

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[6] *Roberts*, 468 U.S. at 623.

[7] *Id.*

[8] *Id.*

[9] *See* N.J. STAT. ANN. § 10:5-4 (West 1993). The statute states, in pertinent part, that

> 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, 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. The statute also states that "'[a]ffectional or sexual orientation' means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J. STAT. ANN. § 10:5-5(hh) (West 1993).

Every state in the United States has some form of antidiscrimination law. Erika Marie Brown & Stephanie Green, *From Private Clubs to Parades: How Accommodating Are State Laws?*, 42 N.Y.L. SCH. L. REV. 125, 126 (1998).

[10] Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM. & MARY L. REV. 919, 919 (1989).

well as additional protected classes.[11] However, because state public accommodations laws vary in their reach, organizations that are subject to a public accommodations law in one state may be outside the reach of a public accommodations law in another.[12]

These antidiscrimination laws have given rise to a number of lawsuits contesting both the reach of the term "public accommodation" and the competing right of organizations to exclude members that impede their expressive functions,[13] along with a great deal of scholarly discussion on these same issues.[14]

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[11] *Id.* at 919; *see also id.* at nn.90-104. State antidiscrimination laws include a variety of protected classes, including race, color, religion, national origin, sex, handicap, marital status, age, sexual orientation, class, and personal appearance. *Id.* at 933. States are not restricted to the discrimination protections embodied in federal law, but can extend those protections because states are not subject to the limitations of the Federal Commerce Clause and because of each state's "paternal" interest in protection of its residents. Margaret E. Koppen, Comment, *The Private Club Exemption from Civil Rights Legislation – Sanctioned Discrimination or Justified Protection of Right to Associate?* 20 PEPP. L. REV. 648 (1993); *see also* Varela, *supra* note 10, at 933.

[12] Varela, *supra* note 10, at 933.

[13] *See generally* Roberts v. United States Jaycees, 468 U.S. 609 (1984); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

[14] *See generally* Larry Cata Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in* Southworth *and* Boy Scouts of America *and European Alternatives*, 36 TULSA L.J. 117 (2000); Michelle L. Carusone, Comment, Dale v. Boy Scouts of America and Monmouth Council*: New Jersey's Attempt to Define Places of Public Accommodation and Remedy the "Cancer of Discrimination,"* 49 CATH. U. L. REV. 823 (2000); Richard A. Epstein, *The Constitutional Perils Of Moderation: The Case Of The Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000); *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 259, 264-65 (2000); Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination law*, 9 LAW & SEX. 163, 185 (1999/2000); Marissa L. Goodman, Note, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825 (1999); Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998); Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & LAW 27 (1994); Margaret E. Koppen, Comment, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate?*, 20 PEPP. L. REV. 643 (1993); Varela, *supra* note 10; David J. Treacy, Note, 10 SETON HALL CONST. L.J. 577 (2000); Stephen P. Warren, Note, *Of Merit Badges and Sexual Orientation: The New Jersey Supreme Court Balances the Law Against Discrimination and the Freedom of Association in* Dale v. Boy Scouts of America, 30 SETON HALL L. REV. 951 (2000).

Two recent lawsuits have held that state public accommodation statutes may ban gender discrimination in membership organizations,[15] but one case has held that a Massachusetts antidiscrimination law may not compel an organization to allow a gay group to participate in a parade.[16] *Boy Scouts of America v. Dale*[17] represents the most recent collision between the principle of expressive association and the competing state interest in nondiscrimination.

II. STATEMENT OF THE CASE

The United States Supreme Court granted certiorari to determine whether the provision of the New Jersey Law Against Discrimination ("NJLAD") prohibiting Boy Scouts of America ("Boy Scouts") from discriminating on the basis of sexual orientation in its membership decisions violated the Boy Scouts' constitutional right of expressive association.[18] The Court held that the application of the NJLAD to the Boy Scouts intruded upon the Boy Scouts' right to express opposition to homosexuality, and that this intrusion was not justified by the state's interest in enforcing its nondiscrimination statute.[19] The Court thus found that the Boy Scouts' right of expressive association was violated by the application of the NJLAD.[20]

The plaintiff, James Dale, joined the Cub Scouts in 1978 and became a Boy Scout in 1981.[21] Dale attained the rank of Eagle Scout in 1988, and was admitted to adult membership as an assistant scoutmaster in 1989.[22] After Dale began college, he revealed the fact that he is gay and became involved with his school's lesbian and gay student organization.[23] In July 1990, Dale was quoted and photographed in a newspaper article about a seminar regarding gay and lesbian

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[15] *Roberts*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. 537 (1987).

[16] *Hurley*, 515 U.S. 557 (1995).

[17] 120 S. Ct. 2446 (2000).

[18] *Id.* at 2449-51.

[19] *Id.* at 2457.

[20] *Id.*

[21] *Id.* at 2449.

[22] *Id.*

[23] *Boy Scouts*, 120 S. Ct. at 2449.

youth issues, and was identified in the article as the co-president of the Rutgers University Lesbian/Gay Alliance.[24]

Less than a month after that newspaper article was published, the Boy Scouts sent Dale a letter advising him that his adult membership in the Boy Scouts had been revoked.[25] Dale responded to this letter by writing to the Boy Scouts and requesting an explanation for the basis of its decision.[26] The Boy Scouts then wrote Dale again, stating that Boy Scouts leadership standards did not allow homosexuals to maintain membership in the Boy Scouts.[27]

Dale sued the Boy Scouts in the Superior Court of New Jersey in 1992.[28] In his complaint, Dale alleged that by terminating his membership because of his sexual orientation, the Boy Scouts had violated both the NJLAD and the common law.[29] The trial court granted summary judgment, holding that the Boy Scouts was not a public accommodation and thus was not subject to the NJLAD.[30] The trial court also dismissed Dale's common law claim for violation

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[24] *Id.*

[25] *Id.* The letter, in pertinent part, read as follows:

> After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America. You should understand that BSA membership is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.

Dale v. Boy Scouts of Am., 706 A.2d 270, 275 (N.J. Super. Ct. App. Div. 1998) (quoting Letter from James W. Kay, Council Executive of Monmouth Council, to James Dale (July 19, 1990)).

[26] *Boy Scouts*, 120 S. Ct. at 2460 (Stevens, J., dissenting).

[27] *Id.* (Stevens, J., dissenting). In his dissent, Justice Stevens noted that despite the reference to Boy Scouts "standards" on homosexuality contained in this second letter, the Boy Scouts did not publicly articulate any standards whatsoever on homosexuality until after Dale was removed from the organization. *Id.* (Stevens, J., dissenting).

[28] *Id.* at 2449. The trial court decision is unpublished and all information below relating to that decision is derived from the later appellate court rulings.

[29] *Id.*

[30] *Id.* at 2450.

of public policy.[31] In addition, the trial court opined that the Boy Scouts did oppose homosexuality,[32] and therefore reasoned that the United States Constitution's guarantee of freedom of expressive association did not allow the state of New Jersey to compel the Boy Scouts to accept a gay man as an adult leader.[33]

The Superior Court of New Jersey, Appellate Division affirmed the dismissal of Dale's common law claim, but reversed as to Dale's claim for violation of the NJLAD.[34] The Appellate Division examined the NJLAD and prior New Jersey case law to determine whether the Boy Scouts was a place of public accommodation.[35] The Appellate Division noted that New Jersey courts have found other similar organizations to be public accommodations,[36] and concluded that the Boy Scouts of America, as well as the local councils of the Boy Scouts, was a place of public accommodation subject to the NJLAD's prohibition against sexual orientation discrimination.[37]

The Appellate Division addressed the constitutional issues raised by the case in some depth.[38] The Appellate Division found that federal cases regarding freedom of expressive association demonstrated a "tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discrimination."[39] The Appellate Division stated that a state law infringing upon an organization's expressive rights must be upheld when the state law does not relate to "the suppression of ideas" and will not im-

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[31] *Id.*

[32] *Boy Scouts*, 120 S. Ct. at 2450. The trial court found that "[a]ccording to its mission and purpose, [the Boy Scouts] has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting." Dale v. Boy Scouts of Am., 706 A.2d 270, 274 (N.J. Super. Ct. App. Div. 1998).

[33] *Boy Scouts*, 120 S. Ct. at 2450.

[34] *Dale*, 706 A.2d at 274.

[35] *Id.* at 279-80.

[36] *Id. See, e.g.*, Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. Ct. App. Div.), *aff'd*, 338 A.2d 198 (N.J. 1974) (Little League Baseball is a place of public accommodation); Fraser v. Robin Dee Day Camp, 210 A.2d 208 (N.J. 1965) (publicly advertised day camp is a place of public accommodation).

[37] *Dale*, 706 A.2d at 280.

[38] *Id.* at 284-293.

[39] *Id.* at 287 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

pinge upon an organization's functioning or goals.[40]

Here, the Appellate Division held that opposing homosexuality was not the Boy Scouts' purpose, and that the inclusion of Dale in the Boy Scouts would not affect its ability to express its ideas or conduct its activities.[41] In so holding, the Appellate Division found that the Boy Scouts' several public position statements on homosexuality did not constitute a collective expression of the Boy Scouts' beliefs.[42] The Appellate Division noted that those position statements, all of which were made after Dale was removed from the Boy Scouts, did not match the beliefs of many of the Boy Scouts' sponsoring organizations, and may have been made "as a litigation stance . . . rather than an expression of a fundamental belief."[43]

Further, the Appellate Division found that *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[44] in which the United States Supreme Court allowed parade organizers to bar a gay and lesbian contingent from marching on expressive association grounds, was distinguishable from this case.[45] The Appellate Division reasoned that while the participation of the gay and lesbian contingent would have changed the expressive content of the parade in *Hurley*, Dale's participation in the Boy Scouts would not hinder the Boy Scouts' objectives or its ability to conduct its activities.[46] Therefore, Dale's membership in the Boy Scouts would not violate the Boy Scouts' expressive rights.[47] The Appellate Division concluded its opinion by stating that it could not "accept the proposition that [the Boy Scouts] has a constitutional privilege of excluding a

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[40] *Id.* (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

[41] *Id.* at 288. In rejecting the trial court's decision, the Appellate Division noted that the trial judge's reference to Dale as an "active sodomist" "raises, no doubt inadvertently, the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas" regarding homosexuality. *Id.* at 288-89. The Appellate Division found this idea to be baseless and explicitly refused to foster "stereotypical notions about homosexuals" in deciding the case. *Id.*

[42] *Id.* at 290.

[43] *Dale*, 706 A.2d at 290-91.

[44] 515 U.S. 557 (1995).

[45] *Dale*, 706 A.2d at 293.

[46] *Id.*

[47] *Id.*

gay person when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself."[48]

The Supreme Court of New Jersey granted certification[49] and unanimously affirmed the decision of the Appellate Division.[50] The court agreed with the Appellate Division's conclusion that the Boy Scouts was a public accommodation within the meaning of the NJLAD, noting that the Boy Scouts conduct broad public solicitation and enjoy close connections with governmental bodies and other public accommodations from which the Boy Scouts derive benefits.[51] The court also found that the Boy Scouts violated the NJLAD by denying Dale the privilege of Boy Scout membership because of his sexual orientation.[52]

The Supreme Court of New Jersey also agreed with the Appellate Division's constitutional analysis.[53] The court held that the NJLAD did not affect the Boy Scouts' expression because members of the Boy Scouts do not associate in order to take a position on gay and lesbian issues.[54] The court noted that the Boy Scouts cautions its leaders not to communicate with boys about sexual issues at all, and that not all of the Boy Scouts' members and sponsors agreed with the Boy Scouts' position on homosexuality.[55] The court found that the Boy Scout

[48] *Id.* In a separate opinion, Judge Landau concurred in the majority's holding that the Boy Scouts were not allowed to discriminate on the basis of sexual orientation in membership decisions. *Id.* at 294 (Landau, J., concurring in part and dissenting in part). However, Judge Landau stated that the Boy Scouts' First Amendment rights should bar the courts from compelling them to accept Dale as an adult leader in the organization. *Id.* at 295 (Landau, J., concurring in part and dissenting in part). Judge Landau reasoned that forcing the Boy Scouts to accept a gay person in a leadership role would alter the expressive message the Boy Scouts wish to send regarding the issue of homosexuality, and that the question of whether that message is "fundamental" to the organization is irrelevant in the context of a plaintiff holding a leadership position. *Dale*, 706 A.2d at 295. At least one commentator has found this distinction unpersuasive. *See, e.g.*, Warren, *supra* note 14, at 958-86 (2000) (concluding that if the Boy Scouts can be required to admit gay members, they may also be required to admit gay leaders because the duties of such leaders do not include instruction on the subject of homosexuality).

[49] Dale v. Boy Scouts of Am., 718 A. 2d 1210 (N.J. 1998).

[50] Dale v. Boy Scouts of Am., 734 A.2d 1166 (N.J. 1999).

[51] *Id.* at 1209.

[52] *Id.* at 1218.

[53] *Id.* at 1223.

[54] *Id.*

[55] *Id.*

Handbook's instructions to boys to be "clean" and morally straight" did not express any view about homosexuality, [56] and described four of the Boy Scouts' position papers on homosexuality as "self-serving."[57]

The court stated that ending invidious discrimination was a compelling state interest because of the negative effects upon minority groups that result from such discrimination.[58] Thus, the court reasoned that even if Dale's forced inclu-

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[56] *Dale*, 734 A.2d at 1224. The Boy Scout Handbook instructs that to be "morally straight," one must

> [B]e a person of strong character, [and] guide your life with honesty, purity and justice.
>
> Respect and defend the rights of all people.
>
> Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Id. at 1224. The Handbook definition of "clean" reads as follows:

> A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.
>
> You never need to be ashamed of dirt that will wash off. . . .
>
> There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

Id. at 1224 (citing the Boy Scout Handbook).

[57] *Id.* at 1224 n.12.

[58] *Id.* at 1227.

sion in the Boy Scouts infringed slightly on the Boy Scouts' expressive rights, the state's compelling interest in ending discrimination justified that infringement.[59] The majority also distinguished this case from *Hurley* on the grounds that "Dale does not come to Boy Scout meetings 'carrying a banner,'" and "has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies."[60] The majority thus found that Dale's presence in the Boy Scouts would not force the organization to tacitly endorse homosexuality and would not violate the Constitution.[61]

The United States Supreme Court granted certiorari[62] and reversed. [63] The Court accepted the Boy Scouts' assertion that the Boy Scouts teaches that homosexuality is immoral,[64] and also determined that Dale's involvement in the Boy Scouts would significantly interfere with its expressive message on homosexuality.[65] The Court held that applying the NJLAD to the Boy Scouts violated the Boy Scouts' right to oppose homosexuality, and that New Jersey's interest in enforcing its nondiscrimination statute did not justify this violation.[66] The majority

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[59] *Id.* at 1228 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

[60] *Id.* at 1229.

[61] *Id.* In a concurring opinion, Justice Handler characterized the Boy Scouts' expressive message regarding homosexuality as vague and inconsistent, and questioned whether the views expressed by the Boy Scouts amount to a "specific expressive purpose" requiring First Amendment protection. *Id.* at 1241 (Handler, J., concurring). Justice Handler also disapproved of the use of "status-based stereotypes" to infer a person's unexpressed views, and reasoned that Dale's public self-identification as a gay person did not interfere with the Boy Scouts' message because Dale's self-identifying speech did not imply anything about his moral or ethical views. *Id.* at 1242 (Handler, J., concurring). The justice specifically denounced the use of stereotypical notions of gay men as immoral persons as an explicit or implied basis for excluding Dale from participation in the Boy Scouts. *Id.* at 1242-43 (Handler, J., concurring). Moreover, Justice Handler described such stereotypical views as "discordant with current law and public policy." *Id.* at 1245 (Handler, J., concurring). Justice Handler concluded that the Boy Scouts' purposes and values would not be disturbed or frustrated by Dale's membership in the organization. *Id.*

[62] Boy Scouts v. Dale, 528 U.S. 1109 (2000).

[63] Boy Scouts v. Dale, 120 S. Ct. 2446, 2449 (2000).

[64] *Id.* at 2453.

[65] *Id.* at 2454.

[66] *Id.* at 2457.

held that the application of the NJLAD to the Boy Scouts violated the Boy Scouts' constitutional right to freedom of expressive association.[67]

III. PRIOR HISTORY

The United States Supreme Court addressed the issue of freedom of expressive association in several cases prior to *Boy Scouts of America v. Dale*.[68] In *Roberts v. United States Jaycees*, the Court addressed a challenge by a national organization to a Minnesota statute prohibiting discrimination on the basis of gender in a place of public accommodation.[69] Two local chapters of the Jaycees, a nonprofit civic organization dedicated to fostering the development and achievement of young men, had begun to admit women as members, and the national organization threatened to revoke the charters of the local chapters.[70]

In *Roberts*, the Court noted precedent which recognized an implied First Amendment right to associate with others to pursue shared goals.[71] The *Roberts* Court declared that the right to freedom of association implies a freedom not to associate,[72] and acknowledged the importance of freedom of association, particularly in protecting the freedom of expression of minority groups.[73] The majority opined that government intervention in an organization's internal operations can amount to an infringement upon that organization's freedom of expressive association.[74] However, the majority also stated, in oft-quoted language, that "[t]he right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through

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[67] *Id.* at 2457.

[68] *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Hurley v. Irish-Am Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

[69] *Roberts*, 468 U.S. at 614-15.

[70] *Id.* at 613-14.

[71] *Id.* at 622.

[72] *Id.* at 623.

[73] *Id.* at 622.

[74] *Id.* at 622-23.

means significantly less restrictive of associational freedoms."[75]

The *Roberts* Court held that the record lacked evidence that the presence of women would affect the organization's expression or its objective of advancing young men's interests.[76] The majority added that even if the Minnesota anti-discrimination law at issue had a slight impact upon the associational freedoms of the national organization, the infringement was justified by the state's compelling interest in ending sex discrimination.[77] The majority noted that discrimination on the basis of sex "[causes] stigmatizing injury," "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."[78]

The Court next examined a California nondiscrimination law that required California Rotary Clubs to allow women as members in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[79] In facts similar to *Roberts*, a local Rotary Club admitted three female members, and consequently the group's charter was revoked by Rotary International ("Rotary") because the Rotary con-

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[75] *Roberts*, 468 U.S. at 623.

[76] *Id.* at 627. The *Roberts* Court explicitly rejected the Jaycees' contention that women might have different views than men about political issues upon which the Jaycees takes an expressive position, finding this contention to be without factual foundation and based "solely on unsupported generalizations" about gender. *Id.* at 627-28.

[77] *Id.* at 628.

[78] *Id.* at 625. The majority also determined that the constitutional right to freedom of intimate association was not implicated here. *Id.* at 620. The *Roberts* Court noted that this right extends to intimate relationships such as family relationships, and that whether an association is intimate enough to require constitutional protection depends on factors such as "size, purpose, policies, selectivity, [and] congeniality." *Id.* The majority found that the Jaycees were a fairly large and non-selective organization, and thus held that they could not claim that their right to intimate association would be breached if they were compelled to accept women members. *Id.* at 621.

In a concurring opinion, Justice O'Connor expressed concern about the test applied by the majority. *Id.* at 632 (O'Connor, J., concurring). Justice O'Connor would have adopted a test that weighed the expressive rights of an organization based upon whether it was predominantly commercial or predominantly expressive, finding a First Amendment violation only when an organization is "predominantly engaged in protected expression." *Id.* at 635-36 (O'Connor, J., concurring). In an apparent foreshadowing of *Boy Scouts*, Justice O'Connor opined that "protected expression [can include] quiet persuasion, inculcation of traditional values, instruction of the young, and community service. . . . Even the training of outdoor survival skills . . . might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 636 (O'Connor, J., concurring).

[79] 481 U.S. 537, 539 (1987).

stitution forbade female members.[80] The local club sought injunctive relief to prohibit Rotary from revoking its charter based on California's Unruh Civil Rights Act,[81] which bans sex discrimination in business establishments.[82] The issue faced by the Court was whether the California law infringed upon the expressive rights of Rotary International.[83] The *Duarte* Court held that inclusion of women in the Rotary Clubs would not infringe upon the organization's right of expressive association because the presence of women would not alter the organization's objectives or impede members from conducting the organization's activities.[84] As the *Roberts* Court had done, Justice Powell, writing for the majority in *Duarte*, added that even if the nondiscrimination statute created a slight infringement upon Rotary members' First Amendment rights, California's interest in deterring sex discrimination and providing equal leadership and employment opportunities for women justified that impact.[85]

In *New York State Club Ass'n v. City of New York*,[86] the United States Supreme Court again considered the impact of an antidiscrimination law upon the expressive association rights of an organization.[87] The law at issue was an amended New York City municipal ordinance that prohibited discrimination on the basis of race, religion, color, nationality, or gender in institutions and clubs with more than four hundred members that provide regular meal service and accept monies from nonmembers for business purposes.[88] The New York State Club

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[80] *Id.* at 541.

[81] CAL. CIV. CODE ANN. § 51 (West 1982).

[82] *Duarte*, 481 U.S. at 541-42.

[83] *Id.* at 539.

[84] *Id.* at 548. The Duarte Court noted that Rotary Clubs do not express political viewpoints on domestic or international issues. *Id.*

[85] *Id.* at 549.

[86] 487 U.S. 1 (1988).

[87] *Id.*

[88] *Id.* at 5-6; *see* N.Y.C. ADMIN. CODE § 8-107(4) (1996). The New York Administrative Code declares, in pertinent part, that it is

> an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public ac-

Association contested this ordinance on First Amendment expressive association grounds,[89] and the Court upheld the ordinance.[90] Because *New York State Club Association* involved a facial challenge, the standard that the Court applied was a stringent one; to prevail, the plaintiff had to prove that the law could never be applied without violating the Constitution, or that the law was "substantially overbroad" and would impinge upon the speech rights of third parties.[91] The *New York State Club Association* Court found the record insufficient to support either of these contentions and held that the ordinance could be applied to at least some of the plaintiff's larger constituent organizations without offending the Constitution.[92]

The Court in *Boy Scouts* relied heavily upon its holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[93] because the *Hurley*

> commodation, because of the actual or perceived race, creed, color, national origin, age, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to make any [declaration], publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, age, gender, disability, marital status, sexual orientation or alienage or citizenship status or that the patronage or custom of any person belonging to, purporting to be, or perceived to be, of any particular race, creed, color, national origin, age, gender, disability, marital status, sexual orientation or alienage or citizenship status is unwelcome, objectionable or not acceptable, desired or solicited.

N.Y.C. ADMIN. CODE § 8-107(4) (1996). The statute was amended to outlaw discrimination by any club that "has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." N.Y.C. ADMIN. CODE § 8-102(9) (1996).

[89] *N.Y. State Club Ass'n*, 487 U.S. at 7. The Association also brought a Fourteenth Amendment equal protection claim, which was rejected by the United States Supreme Court. *Id.* at 18.

[90] *Id.* at 11-15.

[91] *Id.* at 11-12.

[92] *Id.* at 13-14.

[93] 515 U.S. 557 (1995).

Court addressed the issue of forced speech.[94] In *Hurley*, an organization of gay, lesbian, and bisexual Irish-Americans sued for the right to march as a group in Boston's annual St. Patrick's Day parade under the Massachusetts public accommodations law.[95] The parade organizers were allegedly willing to allow gay and lesbian individuals to participate in the parade within other parade units, but were unwilling to allow a separate gay, lesbian, and bisexual contingent to march.[96] The *Hurley* Court held that parades are expressive events, and that even if a parade includes multiple expressions, it is still entitled to First Amendment protection.[97]

The *Hurley* Court further held that speakers are allowed to decide what *not* to say as well as what to say, and determined that to force the parade organizers to accept a gay and lesbian contingent would constitute forced speech and would therefore be unconstitutional.[98] In reaching its holding, the Court noted that the present factual situation differed from a typical expressive association scenario in that individual members of the protected class were not denied access to a public accommodation.[99] The *Hurley* Court thus analyzed the case under freedom of speech principles, not under the *Roberts* expressive association framework.[100] Nonetheless, the Court briefly noted that the case would have been resolved the same way under an expressive association analysis.[101]

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[94] *See* Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2454 (2000).

[95] *Hurley*, 515 U.S. at 560-61.

[96] *Id.* at 572.

[97] *Id.* at 569-70.

[98] *Id.* at 573-75.

[99] *Id.* at 572-73.

[100] *Id.* at 572-73; *see also* Goodman, *supra* note 14, at 875.

[101] *Hurley*, 515 U.S. at 580-81.

IV. *BOY SCOUTS OF AMERICA V. DALE*: EXPRESSIVE ASSOCIATION RIGHTS TRUMP A STATE'S INTEREST IN NONDISCRIMINATION

A. JUSTICE REHNQUIST'S MAJORITY OPINION

Writing for the majority, Justice Rehnquist examined the issue of whether the Boy Scouts' right of expressive association would be violated by the forced inclusion of an openly gay assistant scoutmaster pursuant to the NJLAD.[102] Justice Rehnquist invoked *Roberts v. United States Jaycees* for the proposition that freedom of association preserves the expressive rights of minority groups and implies a freedom not to associate.[103] Justice Rehnquist added that forcing a group to accept an individual violates the group's expressive rights if the presence of the individual significantly affects the group's advocacy of public or private viewpoints.[104] However, Justice Rehnquist added that a group's freedom of association can be trumped by legislation that serves a compelling state interest "unrelated to the suppression of ideas" that cannot be achieved through less restrictive methods.[105]

The majority opinion then addressed the question of whether the Boy Scouts engages in expressive association.[106] The Court stated that in order to make out a claim that its freedom of expressive association has been violated, an organization must claim that it "engage[s] in some form of expression, whether it be public or private."[107] The Court concluded that the Boy Scouts' mission was to transmit values to boys,[108] and held that this mission constituted expressive activity.[109]

[102] Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2451-2458 (2000). Justice Rehnquist's opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Id. at 2448. Justice Stevens dissented in an opinion that was joined by Justices Souter, Ginsburg, and Breyer. *Id.* Justice Souter wrote a separate dissenting opinion joined by Justices Ginsburg and Breyer. *Id.*

[103] *Id.* at 2451 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

[104] *Id.* (citing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)).

[105] *Id.* (citing *Roberts*, 468 U.S. at 623).

[106] *Id.*

[107] *Id.*

[108] *Boy Scouts*, 120 S. Ct. at 2452.

tivity.[109]

The Court next considered whether compelling the Boy Scouts to allow Dale as a member would "significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[110] In deciding this issue, the Court was obliged to independently review the factual record to assess the expression, if any, made by the Boy Scouts regarding the issue of homosexuality.[111] Justice Rehnquist accepted the Boy Scouts' assertion that it teaches that homosexual behavior is immoral, declaring that further inquiry to determine the validity of the Boy Scouts' claim about their expressive message on homosexuality was unnecessary.[112] The Court added that it would defer to the Boy Scouts' belief that its expression would be altered by Dale's presence and stated that Dale's involvement in the Boy Scouts would compel the organization to send the message that homosexuality is morally acceptable.[113] The Court found *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* instructive in this case, reasoning that Dale's membership would significantly burden the Boy Scouts by forcing it to express a view on homosexuality with which it disagreed, just as the compelled presence of a gay and lesbian contingent in the Boston parade would have significantly burdened the expressive message of parade organizers.[114] The Court thus found that Dale's presence would significantly burden the Boy Scouts' expression.[115]

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[109] *Id.* The Court cited Justice O'Connor's concurring opinion in *Roberts* for the proposition that the teaching of outdoor skills and community service can be a form of expression if the organization intends to use those functions to instill values. *Id.* (citing *Roberts*, 468 U.S. at 636) (O'Connor, J., concurring).

[110] *Id.*

[111] *Id.*

[112] *Id.* at 2453. In spite of its contention that further facts were unnecessary, the Court pointed to the several position statements of the Boy Scouts opposing homosexuality as well as the Scouts' litigation position on homosexual conduct in other cases. *Id.* (citing Curran v. Mount Diablo Council of Boy Scouts of Am., 952 P. 2d 218 (Cal. 1998)).

[113] *Id.* at 2453-54 (citing Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 123-24 (1981)). The Court reasoned, in part, that Dale's public honesty about his sexual orientation and his "gay activis[m]" would have an impact on the Scouts' expressive message about homosexuality. Id. at 2454.

[114] *Boy Scouts*, 120 S. Ct. at 2454 (citing Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. at 557, 574-75 (1995)).

[115] *Id.* at 2455.

The Court expressed disagreement with the reasoning of the New Jersey Supreme Court decision.[116] The Court found that if an organization engages in expression that could be trammeled by an individual's involvement in the organization, whether or not that expression is part of the organization's purpose, the organization's expressive association rights are protected by the First Amendment.[117] The majority added that the Boy Scouts' expression merits protection even if its message on homosexuality consists of leadership by example and does not involve discussions of sexuality with boys in any manner whatsoever.[118] The Court also held that an organization's speech rights must be upheld even when the organization's members do not all agree on the expressed message for which the organization seeks constitutional shelter.[119]

The Court then turned to the ultimate question of whether the NJLAD, as applied to the Boy Scouts, would violate the Boy Scouts' First Amendment rights.[120] The majority found that some public accommodations laws have broadened over time to encompass a wider variety of places and organizations, including places that are not open to the general public.[121] The Court also stated that public accommodations laws sometimes cover minority groups that are not afforded heightened scrutiny under the United States Constitution.[122] Tellingly, the majority found that New Jersey's application of its antidiscrimination law to the Boy Scouts was the first decision by a state supreme court to include the Boy Scouts within the ambit of a public accommodations statute.[123]

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[116] *Id.* at 2454.

[117] *Id.* The Court noted that in *Hurley*, the parade did not exist for the purpose of communicating a message about sexual orientation, but *Hurley* nonetheless upheld the organization's right to exclude the lesbian and gay contingent from the parade. *Id.*

[118] *Id.* at 2454-55. The majority pointed out that the Boy Scouts disagreed with Dale's contention that the Boy Scouts instructs leaders to avoid discussing sexual matters with the scouts, but found that even if Dale were correct, the organization's expression could still be protected. *Id.*

[119] *Id.* at 2455.

[120] *Boy Scouts*, 120 S. Ct. at 2455.

[121] *Id.* at 2455-56.

[122] *Id.* at 2455 n.2.

[123] *Id.* at 2456 n.3. The Court cited five state cases and a federal case which reached contrary results. *Id.* (citing Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993), *cert. denied*, 510 U.S. 1012 (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

Justice Rehnquist distinguished *Roberts v. United States Jaycees* and *Board of Directors of Rotary International v. Rotary Club of Duarte* on the grounds that in those cases, each of the states in question had a compelling interest in enforcing its antidiscrimination law, but the laws at issue did not materially burden either organization's expression.[124] Therefore, the justice explained, the Court in those cases found that the states' interests in their respective public accommodations statutes trumped the expressive rights of the organizations.[125] In contrast, Justice Rehnquist here found that the Boy Scouts' expressive rights would be invaded by the forced inclusion of Dale in the organization.[126] The majority then held that New Jersey's interest in enforcing its antidiscrimination law did not warrant the "severe intrusion" upon the expressive rights of the Boy Scouts that would result if the Boy Scouts were compelled to allow Dale as a member.[127] Therefore, the majority ruled that the application of the NJLAD to the Boy Scouts in this case violated the Boy Scouts' right of expressive association.[128]

The Court concluded the opinion by noting that the increasing social acceptance of homosexuality was irrelevant to the Court's decision, as were the opinions of the Justices as to whether the Boy Scouts' policy was correct.[129] The Court further declared that freedom of speech is a crucial value in the American political system, and that laws could not be allowed to interfere with an organi-

(Kan. 1995); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976)).

[124] *Id.* at 2456.

[125] *Id.*

[126] *Boy Scouts*, 120 S. Ct. at 2457.

[127] *Id.* The Court also rejected Dale's suggestion that the O'Brien test for evaluating government regulations incidentally affecting speech should be used here. Id. at 2456-57 (citing United States v. O'Brien, 391 U.S. 367 (1968)). The O'Brien Court held that a government regulation incidentally affecting speech (in that case, a law against destroying draft cards) is constitutional if it falls within "the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The Boy Scouts Court held that the NJLAD "directly and immediately affects associational rights," rendering the O'Brien test inapposite. *Boy Scouts*, 120 S. Ct. at 2456-57.

[128] *Boy Scouts*, 120 S. Ct. at 2457.

[129] *Id.* at 2457-58.

zation's freedom of speech regardless of whether the government agreed with that organization's expression.[130]

B. JUSTICE STEVENS' DISSENT

Justice Stevens' dissenting opinion framed the issue as whether New Jersey's broad interpretation of the NJLAD violated the constitutional rights of the Boy Scouts.[131] In analyzing this issue, Justice Stevens invoked the words of Justice Brandeis, who cautioned future justices of the Supreme Court to be "ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[132] Justice Stevens concluded that the application of the NJLAD would not significantly burden the Boy Scouts' efforts to achieve its goals or compel the Boy Scouts to send any particular message.[133]

Next, the Justice undertook an examination of the facts of the case, finding that the Boy Scouts' Oath and Law made no mention of homosexuality, and that the Boy Scouts instructed boys to look to their parents or teachers for information on sexual matters.[134] Justice Stevens stated that the Boy Scouts allowed scoutmasters to answer questions about sex, but encouraged them to refer boys to other sources.[135] The dissent also found that several organizations that spon-

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[130] *Id.*

[131] *Id.* at 2459 (Stevens, J., dissenting). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *Id.*

[132] *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Justice Rehnquist's majority opinion found Justice Stevens' use of this quotation to be inapposite on the grounds that Justice Brandeis' words related to substantive due process in the economic realm and not to free speech issues. *Id.* at 2457-58 (Stevens, J., dissenting). Justice Rehnquist added that Justice Brandeis' commentary on the First Amendment supported the Court's pro-free speech decision in this matter. *Id.* (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[133] *Id.* at 2459-60 (Stevens, J., dissenting).

[134] *Boy Scouts*, 120 S. Ct. at 2461-62 (Stevens, J., dissenting).

[135] *Id.* at 2462 (Stevens, J., dissenting). Justice Stevens quoted from several portions of the Scoutmaster Handbook as follows: "If Scouts ask for information regarding sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional." *Id.* (quoting Scoutmaster Handbook (1990)). Justice Stevens quotes the following additional language:

sored Boy Scout troops disagreed with the organization's purported message about homosexuality.[136] Justice Stevens took notice of a 1978 policy statement stating that openly gay males should not be allowed in the Boy Scouts.[137] However, the Justice opined that because the policy was never publicly disseminated and because the policy did not connect disapproval of homosexuality to a shared goal of the Boy Scouts, the policy was not sufficiently unequivocal or sufficiently connected to the organization's purposes to rise to the level of constitutionally protected expression.[138]

Justice Stevens also found the Boy Scouts' later position statements on homosexuality, all of which were written after Dale's removal from scouting, to be irrelevant here.[139] Taking the view that the Boy Scouts' 1993 position statement did not link the Boy Scouts' position to the Scout Oath and Law, the Justice thus

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> You may have boys asking you for information or advice about sexual matters . . . How should you handle such matters?
>
> Rule number 1: *You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area*, and that you are probably not well qualified to do this.
>
> Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.
>
> Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck.

Id. (quoting Scoutmaster Handbook (1972) (emphasis added in original)). The majority, however, noted that the Boy Scouts presented evidence that it does not discourage scout leaders from discussing sexual issues. *Id.* at 2454-55.

[136] *Id.* at 2462-63 (Stevens, J., dissenting).

[137] *Id.* at 2463-64 (Stevens, J., dissenting).

[138] *Id.*

[139] *Id.* at 2464 (Stevens, J., dissenting).

found the statement was not based upon a shared goal or expression but was merely an exclusionary membership policy.[140] Justice Stevens added that there was no evidence in the record that the Boy Scouts taught boys about its policy against homosexuality or changed any of its other policies or procedures to match its position statement, thus discrediting the Boy Scouts' claim that its exclusion of gays was based upon an effort to impart beliefs in the immorality of homosexuality.[141] The dissent also viewed the Scouts' messages on homosexuality as incoherent and noted the distinction between the Boy Scouts' disapproval of homosexual conduct and its termination of Dale merely because of his sexual orientation.[142]

Justice Stevens then began his legal analysis by noting that the Court had never, until this case, held that an organization's discriminatory membership policy trumped a state's interest in enforcing an antidiscrimination law.[143] Justice Stevens cited *Roberts v. United States Jaycees* for the proposition that an organization's associative rights may be restricted by laws serving compelling state interests that cannot be realized through other means.[144] Justice Stevens noted that in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that even if the organization's expressive rights were slightly affected by California's Unruh Act, that effect was justified by the state's interest in ending gender discrimination and thus did not offend the First Amendment.[145] Based on *Roberts* and *Duarte*, the dissent declared that an organization making an expressive association claim cannot prevail simply because it engages in some kind of expression, or implements an exclusionary membership policy, or in some way connects its expression and its exclusionary policy.[146] Instead, the Justice found that the question was whether a person's presence in an organiza-

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[140] *Boy Scouts*, 120 S. Ct. at 2464-65 (Stevens, J., dissenting).

[141] *Id.* at 2465-66 (Stevens, J., dissenting).

[142] *Id.* at 2465 (Stevens, J., dissenting).

[143] *Id.* at 2467 (Stevens, J., dissenting). In fact, Justice Stevens noted that the Court has held, multiple times, that a state nondiscrimination law does not infringe upon an organization's expressive rights just because that organization excludes certain groups from membership. *Id.* at 2467 (Stevens, J., dissenting) (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)).

[144] *Id.* (citing *Roberts*, 468 U.S. at 623); *see supra* text accompanying notes 69-78.

[145] *Boy Scouts*, 120 S. Ct. at 2468 (Stevens, J., dissenting) (citing *Duarte*, 481 U.S. at 549); *see supra* text accompanying notes 79-85.

[146] *Boy Scouts*, 120 S. Ct. at 2468-69 (Stevens, J., dissenting).

tion would seriously affect, burden, or substantially restrain an organization's shared, basic goals or its collective attempt to foster beliefs.[147]

Justice Stevens then raised the question of what the Boy Scouts' shared goals were and whether the application of the NJLAD would impede the Boy Scouts' expression.[148] Justice Stevens found it "exceptionally clear" that the Boy Scouts did not share a goal of opposition to homosexuality.[149] Justice Stevens noted that most scouting documents said nothing whatsoever about sexual orientation, and found no evidence that the Boy Scouts actually taught its members anything about homosexuality.[150] Further, the dissent stated that the NJLAD would not affect the Boy Scouts' freedom of expression any more than the discriminatory policies of the organizations in *Roberts* and *Duarte* were affected by their states' public accommodation statutes.[151]

Justice Stevens then expressed his strong disagreement with the majority's reasoning.[152] According to the Justice, the majority's conclusion that the Boy Scouts teaches that homosexual conduct is immoral was based solely on assertions within the Boy Scouts' brief and reply brief.[153] The dissent stated that the majority's decision not to evaluate the factual basis of this contention was "astounding," especially considering that the majority recognized its obligation to conduct an independent review of the facts in this case.[154] The Justice opined that the Court should have inquired whether the Boy Scouts did indeed express a message about homosexuality before deciding whether that expression was protected by the First Amendment.[155] In Justice Stevens' view, the Boy Scouts should also have been required to show that it took an unequivocal position at odds with a message "advocated or epitomized" by Dale's participation in order

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[147] *Id.* at 2469 (Stevens, J., dissenting).

[148] *Id.* at 2469-70 (Stevens, J., dissenting).

[149] *Id.* at 2470 (Stevens, J., dissenting).

[150] *Id.*

[151] *Id.*

[152] *Boy Scouts*, 120 S. Ct. at 2470-71 (Stevens, J., dissenting).

[153] *Id.* at 2470 (Stevens, J., dissenting).

[154] *Id.* at 2471 (Stevens, J., dissenting).

[155] *Id.*

to prevail.[156]

The dissent expressed concern that the Court's failure to determine the authenticity of the Boy Scouts' alleged message about homosexuality could open the door for organizations to evade nondiscrimination laws by creating sham "expressions" for litigation purposes.[157] Justice Stevens declared that "[u]nless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws, an independent inquiry is a necessity."[158] Justice Stevens then concluded that the Boy Scouts had not sustained an expressive association claim.[159]

Next, the dissent addressed the question of whether the Boy Scouts had a First Amendment claim for forced speech.[160] Justice Stevens noted that the Boy Scouts could not, under the First Amendment, be compelled to advance a position about homosexuality that it did not wish to articulate.[161] In evaluating this question, Justice Stevens reasoned that Dale's activism on gay issues outside the Boy Scouts should not create a presumption that he would express his views on the subject within his troop.[162] Justice Stevens noted that the Boy Scouts "does not discourage or forbid outside expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization."[163] The dissent found no evidence that Dale had any intention of using his position within the Boy Scouts to teach that homosexuality was morally acceptable, and no evidence that he had ever done so.[164]

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[156] *Id.*

[157] *Id.* at 2470-71 (Stevens, J., dissenting).

[158] *Boy Scouts*, 120 S. Ct. at 2472 (Stevens, J., dissenting). In other cases, the Boy Scouts have claimed the right to expressive association for religious purposes, and at least one writer has found the Boy Scouts' attempt to link their mission to religious expression to be a tenuous one. Lisa A. Hammond, Note, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L. J. 1385, 1393 (1992).

[159] *Boy Scouts*, 120 S. Ct. at 2472 (Stevens, J., dissenting).

[160] *Id.*

[161] *Id.*

[162] *Id.* at 2473-74 (Stevens, J., dissenting).

[163] *Id.* at 2473 (Stevens, J., dissenting).

[164] *Id.* Justice Stevens added that the Boy Scouts have a policy that any person advocating the moral acceptability of homosexual conduct within the Boy Scouts, regardless of that person's sexual orientation, cannot serve as an adult scout leader; however, the Justice also noted that the Boy Scouts do not terminate the membership of individuals who undertake such

Justice Stevens then turned to the Boy Scouts' argument that Dale's mere presence would compel the Boy Scouts to express a message about homosexuality, regardless of Dale's intent or behavior when carrying out his scouting responsibilities.[165] The Justice opined that there was a "wide gulf" between this case and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, where the Court held Massachusetts' public accommodations law to be unconstitutional as applied to the Boston St. Patrick's Day parade.[166] The dissent stated that in *Hurley*, the Court "expressly distinguished between [members of the gay and lesbian organization], who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so."[167] Justice Stevens added that the *Hurley* Court thought it likely that the participation of the Irish-American gay and lesbian organization would be interpreted as the speech of the parade organizers.[168] However, Justice Stevens opined that the *Boy Scouts* case was completely different from *Hurley*:

> [Dale's participation in the Boy Scouts] sends no cognizable message to the Scouts or to the world. . . . Dale did not carry a banner or a sign . . . and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.[169]

Justice Stevens acknowledged that some acts qualify as symbolic speech, but found that Dale's act of joining the Boy Scouts was not such an act.[170] The dis-

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advocacy outside the organization. *Id.* at 2474 n.19 (Stevens, J., dissenting).

[165] *Boy Scouts*, 120 S. Ct. at 2474 (Stevens, J., dissenting).

[166] *Id.* at 2474-75 (Stevens, J., dissenting) (citing Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 575 (1995)).

[167] *Id.* at 2475 (Stevens, J., dissenting) (citing *Hurley*, 515 U.S. at 572-73).

[168] *Id.* (citing *Hurley*, 515 U.S. at 575).

[169] *Id.* Justice Stevens mentioned that the majority did not argue that Dale's public self-identification as a gay man caused him to be so identified with homosexuality that his presence in scouting would be tantamount to using the organization to channel his message to scouts. *Id.* Furthermore, the Justice found that the facts in the record, which show only one newspaper interview given by Dale regarding gay issues, would not provide sufficient support for an argument that Dale was symbolic of an expressive message about sexual orientation. *Id.*

[170] *Id.* at 2475-76 (Stevens, J., dissenting) (citing Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989)).

sent reasoned that if joining a group were interpreted as symbolic speech, and organizations had the right to bar that speech, the right to free speech would become "a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities."[171] Justice Stevens then declared that the majority opinion seemed to imply that an openly gay man can be treated as though the mere expression of his sexual orientation is a permanent symbolic label justifying special treatment under the First Amendment for organizations that wish to exclude him.[172] Justice Stevens added that the Boy Scouts would not be sending any message by admitting someone as a member, given that the organization had more than one million adult members in 1992.[173] Further, the dissent pointed out that there was no evidence that anyone in Dale's Boy Scout troop knew of his sexual orientation before the Boy Scouts removed him from the organization.[174] Based upon the foregoing, the dissent found that Dale's presence in the Boy Scouts was not an instance of symbolic speech.[175]

Justice Stevens concluded his opinion by comparing anti-gay animus and stereotyping to prejudice against interracial couples,[176] and decried the harm that such prejudices have caused in American culture.[177] The Justice cautioned that the majority's decision would create a "constitutional shield" for a policy based upon stereotypical notions about a minority group, and thus cause further harm to gays and lesbians.[178]

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[171] *Boy Scouts*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 2474-77 (Stevens, J., dissenting). Justice Stevens noted that the Boy Scouts unsuccessfully argued that the NJLAD would violate its right of intimate association. *Id.* at 2477 n.26 (Stevens, J., dissenting). Justice Stevens found that the Boy Scouts' size, mission, and lack of selectivity did not fall within the category of an intimate association. *Id.*

[176] *Id.* at 2477-78 (Stevens, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (upholding law criminalizing certain sexual activities as applied to consenting same gender adults); Loving v. Virginia, 388 U.S. 1, 3 (1967) (overturning law prohibiting marriage between African-American and Caucasian persons)).

[177] *Boy Scouts*, 120 S. Ct. at 2478 (Stevens, J., dissenting).

[178] *Id.*

C. JUSTICE SOUTER'S DISSENT

In a brief dissent, Justice Souter, while noting with approval the gradual decrease in social prejudice against gays and lesbians, cautioned that "[t]he fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case."[179] Justice Souter emphasized that the Boy Scouts had not engaged in any "unequivocal advocacy" on homosexuality, and thus could not justify its exclusion of Dale by a claim of expressive association.[180] The Justice agreed with Justice Stevens that an organization must take a clear position on an issue in order to be entitled to First Amendment protection for its position.[181] However, the Justice cautioned that if an organization made a valid expressive association claim, the organization would have the right to exclude an individual if that individual "epitomize[d]" a position that opposed the organization's advocacy, regardless of whether the Court agreed with the organization.[182]

V. CONCLUSION

The tightrope that courts must walk in engaging in fact-sensitive First Amendment analysis is clearly illustrated in the *Boy Scouts* case. If courts err on the side of giving undue deference to organizations about what constitutes a group's expression and what state action would impede that expression, they run the risk of allowing status-based discrimination to run wild under the guise of expressive association.[183] However, when courts uphold nondiscrimination laws in the expressive association context, they run the opposite risk of unduly restricting the free speech rights of organizations and minority groups and allowing states to impose an expressive orthodoxy upon organizations.[184] Thus, *Boy Scouts* can be read as a staunch defense of private organizations' rights of expressive association in the face of state regulation. In contrast, the case can also be read as a startling retreat from the Court's past willingness to uphold antidis-

[179] *Id.* at 2479 (Souter, J., dissenting). Justice Souter was joined by Justices Ginsburg and Breyer. *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *See Boy Scouts*, 120 S. Ct. at 2471-72 (Stevens, J., dissenting).

[184] *See id.* at 2457-58.

crimination laws against expressive association claims: a retreat that is either based on the Court's discomfort with broad antidiscrimination statutes or upon the Court's unwillingness to view laws protecting lesbians and gay men from discrimination as evidence of compelling state interests.[185] Regardless of the ideological position of the reader, *Boy Scouts* points out the blurriness of the Court's constitutional doctrine on expressive association and the need for clarification of just what constitutes protected expression in an organizational context.[186]

The *Boy Scouts* Court created confusion in its expressive association jurisprudence by subtly altering the elements applied in expressive association cases while purporting to use the same test it had used in past cases such as *Roberts* and *Duarte*.[187] The Court's analysis in *Boy Scouts* in fact appears quite different than the analysis in those cases. In *Roberts*, the Court found that the objective of the Jaycees was to advance the interests of young men.[188] The *Roberts* Court found that the presence of women members in the organization would not affect the group's ability to pursue that objective.[189] Therefore, the *Roberts* Court held that the forced inclusion of women did not offend the Constitution.[190] Similarly, in *Duarte*, the Court found that the inclusion of women would not prevent the Rotary organization, an organization that did not take positions on political issues,[191] from conducting its activities or working toward its goals.[192]

In contrast, the *Boy Scouts* Court stated that an organization asserting its expressive rights is not required to show that the expression at issue is tied to the

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[185] *See id.* at 2476 (Stevens, J., dissenting); *see* Backer, *supra* note 14, at 139 (2000) (suggesting that the Court gives deference to the expressive purposes of all-male organizations that exclude gays); *see also* Martin H. Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right,"* 36 TULSA L. J. 43, 53 n.103 (2000) (expressing doubt that the *Boy Scouts* Court would have found a membership restriction based on race or creed to be constitutionally protected).

[186] Backer, *supra* note 14, at 150-51; *see also* Varcoe, *supra* note 14, at 185 (suggesting that the *Roberts* test is vague and can lead to arbitrary decisionmaking).

[187] Backer, *supra* note 14, at 138.

[188] Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984).

[189] *Id.*

[190] *Id.*

[191] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).

[192] *Id.*

organization's purpose.[193] The Court added that an organization's expression may be protected even if it is communicated "by example" and even if there is opposition to that expression within the organization's membership.[194] In seeming contradiction of its resolve to undertake an independent review of the factual record, the Court also opined that the Boy Scouts' mere assertion that it engaged in expression about homosexuality was sufficient proof of the existence of that expression.[195] The Court then gave deference to the Boy Scouts' perspective on whether state restrictions would compromise the organization's expression about homosexuality.[196] As noted by Justice Stevens, this remarkable deference stands in contrast to the Court's willingness in earlier case law to analyze and sometimes reject an organization's contention that it engages in expression on an issue.[197] The *Boy Scouts* Court's analysis of this issue strengthened organizations' ability to protect expressive messages, but went too far in allowing the Boy Scouts to simply set forth bare assertions as to its expressive position without any judicial scrutiny of those assertions.

One vital element in the Court's holdings in *Roberts* and *Duarte* was the balancing between the organizations' expressive rights and the states' respective interests in enforcing their laws.[198] In each case, the Court held that even if the application of the nondiscrimination statute would slightly infringe upon the rights of the organization, that infringement was constitutionally valid because of the state's compelling interest in protecting women from discrimination.[199] The *Boy Scouts* Court decided this issue very differently:

> We recognized in . . . *Roberts* and *Duarte* that [s]tates have a compelling interest in eliminating discrimination against women . . . . But in each of these

[193] Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2454 (2000). This approach has been criticized on the grounds that mere expression should not trigger First Amendment protections when the expression at issue does not relate, or is only tenuously related, to an organization's purposes. *See The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 259, 264-65 (2000).

[194] *Boy Scouts*, 120 S. Ct. at 2454-55.

[195] *Id.* at 2453.

[196] *Id.* at 2454.

[197] *Id.* at 2471 (Stevens, J., dissenting); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

[198] *See Roberts*, 468 U.S. at 628; *Duarte*, 481 U.S. at 549.

[199] *See Roberts*, 468 U.S. at 628; *Duarte*, 481 U.S. at 549.

cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. . . . We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws. . . . We have already concluded that a state requirement that the Boy Scouts retain Dale . . . would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.[200]

The quoted language strongly implies that the *Boy Scouts* Court has altered the elements of an expressive association claim by effectively abandoning the compelling state interest test. The *Boy Scouts* Court allowed New Jersey's interest in enforcing its nondiscrimination statute to be swallowed by the Boy Scouts' free speech rights.[201] It appears that after *Boy Scouts*, an organization that proves that its expression would be significantly burdened by a state nondiscrimination law has won its case, without any real opportunity for the state in question to justify the application of its law. While this holding is a victory for organizations' freedom of expressive association, it provides very little protection for individuals in minority groups seeking access to public accommodations, and represents a defeat for states that seek to end discrimination.

The Court's treatment of the legal doctrines in this case makes the case seem much easier than it actually would have been if the Court had truly applied its own First Amendment precedents. The Court accepted at face value the Boy Scouts' assertion that it engaged in expression disapproving of homosexuality and that the inclusion of Dale in the organization would burden that expression; further, the Court dismissed out of hand the idea that New Jersey's interest in preventing the stigmatizing effects of discrimination might justify the inclusion of Dale.[202] If the Court had put the Boy Scouts to its proofs as to whether its expressions regarding sexual orientation, if any, were central to the organization's purposes, the Boy Scouts may have had difficulty showing that it engaged in any speech about homosexuality prior to this litigation.[203] Also, if the Court had ap-

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[200] *Boy Scouts*, 120 S. Ct. at 2456-57.

[201] *See* Backer, *supra* note 14, at 134-35 (2000). Backer suggests that the Court's hidden agenda may have been to tacitly find states' interests in their nondiscrimination laws to be less compelling when the plaintiff does not belong to a protected class under the Court's Fourteenth Amendment jurisprudence. *Id.* at 135-36.

[202] *Boy Scouts*, 120 S. Ct. at 2453, 2454, 2456-57.

[203] *See, e.g.*, *The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 259, 264-65 (2000).

plied its past doctrine regarding a state's compelling interest in enforcing its laws, Dale may have been able to demonstrate that the state of New Jersey has a compelling interest in ending the stigmatizing injury caused by discrimination on the basis of sexual orientation.[204] However, the Court's approach to the case diminished the importance of these two elements, making it virtually impossible for the Boy Scouts to lose.

The Court further confused matters by using *Hurley* as a precedent despite the fact that *Hurley* was primarily a freedom of speech case, with an expressive association analysis included almost as an afterthought.[205] In *Hurley*, the Court found that the parade was symbolic speech that required First Amendment protection, while the *Roberts*, *Duarte*, and *New York State Club Association* Courts did not find those organizations' membership decisions to be symbolic speech.[206] The situation in *Boy Scouts* bears a greater similarity to the facts of the latter three cases in that it involves a membership decision, but the *Boy Scouts* Court applied *Hurley* along with *Roberts* and adopted *Hurley's* "lenient approach" [207] to the issue of the expressive goals of the Boy Scouts.

What course should the *Boy Scouts* Court have taken? Is the test articulated by the Court in *Roberts* and ostensibly followed in *Dale* the best way to balance states' interests in nondiscrimination laws with organizations' expressive rights? Commentators have offered a variety of suggestions on how courts should analyze expressive association claims, ranging from offering blanket expressive protection to all private organizations that do not have "monopoly power"[208] to lim-

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[204] *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1227-28 (N.J. 1999). The New Jersey Supreme Court stated that "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society." *Id.*; *see also id.* at 1244-45 (Handler, J., concurring) (asserting that negative stereotypes of lesbians and gays do not reflect current law and public policy).

[205] Goodman, supra note 14, at 875 (1999); *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580-81 (1995).

[206] *See, e.g.*, Goodman, *supra* note 14, at 875.

[207] Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 102 (1998) (stating that the *Hurley* Court made it possible for organizations to prevail on associative claims—even when those organizations sent no narrow or succinct message related to the excluded persons—without being required to show that their expressive purpose would be burdened by the presence of the excluded persons).

[208] Richard A. Epstein, *The Constitutional Perils Of Moderation: The Case Of The Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000). Epstein argues that unless an organization has a monopoly position such that individuals have no choice but to deal with that organization, the organization should enjoy the same broad expressive rights afforded to the Boy Scouts. *Id.* at 120-21. Epstein reasons in part that this bright-line test would foster clarity in the law. *Id.* at

iting *Hurley* to pure speech cases rather than expressive association claims.[209] One commentator suggests a test that would allow non-state-sponsored organizations substantial associative latitude in membership decisions, but would curtail that latitude in the organization's dealings with nonmembers,[210] while another calls for more "black letter interpretive guidance" on First Amendment issues but expresses doubt that such guidance will come to pass.[211] Still others seek to avoid constitutional problems by proposing bright-line public accommodation laws that would be likely to obviate the need for litigation over expressive association claims.[212]

In the final analysis, there may be no perfect method for balancing the rights

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[209] Hutchinson, *supra* note 14, at 113. Writing prior to the decision in *Boy Scouts*, Hutchinson argues that *Hurley* "stands on a fractured theoretical ground" for many reasons, but particularly for its failure to find the exclusion of the Irish-American gay and lesbian group members to be a discriminatory act. *Id.* at 110. Hutchinson contends that the extension of *Hurley* to cover the *Dale* facts "would erect an almost insurmountable barrier to state antidiscrimination efforts" by allowing any organization that engages in expression to ban any message even if the excluded message does not relate to the organization's expression. *Id.* at 113.

[210] Varcoe, *supra* note 14, at 273. Varcoe qualifies his position by stating that organizations that have "a special role in relationship to the state that connotes state endorsement of the organization's activities and goals" should not be entitled to the same associative freedom as other organizations, and that the Boy Scouts should withdraw from close partnerships with government entities if it wishes to continue to discriminate on the basis of sexual orientation. *Id.* at 266-74.

[211] Backer, *supra* note 14, at 150. Backer laments that the First Amendment "has lost its moorings in the black letter and been tossed in a sea of secondary interpretive doctrines which effectively drain the constitutional protection of any meaning." *Id.* Backer adds that First Amendment jurisprudence is plagued by outcome-based decisionmaking based upon the "whims and passions" of the Supreme Court. *Id.* at 151; *see also* Eskridge, *supra* note 14, at 1397 (suggesting that courts are inclined to follow social norms in constitutional law cases when those norms reflect a view of minority groups as "malignant"); Hutchinson, *supra* note 14, at 87 (noting that some commentators view court decisions on hot-button issues as reflections of the personal views of judges).

[212] *See* Frank, *supra* note 14, at 80 (proposing public accommodation statutes that cover only those distinctly private organizations which fall within constitutional protections for intimate, expressive, or religious association); Eskridge, *supra* note 14 at 1356 n.130 ("State courts have been too expansive in their constructions of 'public accommodations.'"); Carusone, *supra* note 14, at 865-71 (asserting that public accommodation laws should contain a statement of intent with clear exemptions, and should be applied based upon the goods or services provided by the organization without regard for a fixed physical site); Varela, *supra* note 10, at 951-52 (suggesting that state legislatures should include clear statements of purpose and detailed, bright-line definitions of public accommodations).

of organizations to exclude members on expressive association grounds and the interests of states in preventing the stigmatizing effects of invidious discrimination. The *Roberts* test attempts to protect the interests of both organizations and states, but results in a highly subjective and fact-sensitive standard that is vulnerable to criticism for its lack of predictability and potential for outcome-based manipulation.[213] However, any alteration of the *Roberts* framework runs the risk of tilting the balance overwhelmingly in favor of states or of organizations. The holding in *Boy Scouts* did exactly that by downplaying the question of whether New Jersey's compelling interest in preventing discrimination could justify infringing upon an organization's associative rights and by neglecting to independently examine the question of whether the admittance of Dale would have a significant impact on the Boy Scouts' speech.[214] In the future, the Court should resist the temptation to tacitly alter previously established doctrines in order to make easy cases out of difficult ones and should hold to the *Roberts* framework in evaluating freedom of expressive association claims.

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[213] *See infra* note 211 and accompanying text.

[214] Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2472 (2000) (Stevens, J., dissenting).