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Treading on the Constitution to Get a Foot in the Clubhouse Door

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I. INTRODUCTION

Eliminating discrimination is undoubtedly a central concern of contemporary constitutional law, but one must not lose sight of the fact that the Constitution does not prohibit discrimination by parties who are not state actors. Acts of discrimination by people who are not state actors may, in fact, be entitled to constitutional protection. Claims of this "right to discriminate" arise quite frequently in the context of challenges to so-called "public accommodation statutes."[1] The application of a public accommodation statute against a group that is

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1. *See, e.g.*, NEB. REV. STAT. § 20-132 (Reissue 1997) ("All persons within this state shall be entitled to a full and equal enjoyment of any place of public accommodation, . . . without discrimination or segregation on the grounds of race, color, sex, religion, national origin, or ancestry."). Despite the absence in § 20-132 of the express protection against discrimination on the ground of sexual orientation, the possibility that such an argument may soon be made looms on the horizon because of the recent addition of an equal protection clause to the Nebraska Constitution.

inherently expressive in nature could quite possibly infringe upon that group's constitutionally protected freedom of "expressive association."[2]

The constitutionality of applying anti-discrimination legislation to all organizations classified by a state as "public," such as the Boy Scouts in New Jersey, is by no means settled. The United States Supreme Court has been confronted with the constitutionality of such statutes on three occasions: *Roberts v. United States Jaycees*;[3] *Board of Directors of Rotary International v. Rotary Club*;[4] and *New York State Club Ass'n v. City of New York*.[5] In all three cases the Court refused to establish a per se rule. A careful reading of these opinions indicates that invocation of accommodation statutes will not be allowed to be used to pry open the door to *all* clubs that solicit membership from the general public. Rather, such statutes are unlikely to be upheld if applied to a situation in which the government has not shown a compelling interest for infringement of the group's right of expressive association.

This article explains how these three cases, which comprise the "*Roberts* trilogy," illuminate the analytical framework for evaluating a claim of "freedom of expressive association" when a club attempts to invoke the right to discriminate in order to be selective in accepting members. The first step of analysis, determining the type of association, originates in the *Roberts* opinion. Writing for the Court in *Roberts*, Justice Brennan recognized two classes of the right of association: intimate association and expressive association. Most large organizations may still wish to be selective, but will probably not fall within the "intimate association"[6] exemption. An avenue, and quite possibly the only avenue, through which such groups may be able to avoid being forced to accept members they wish to exclude, therefore, is through the "expressive association" exemption.[7] Under this exemption, the controlling factor in the Court's analysis appears to be the group's objective or purpose. The second step of the analysis more closely examines the group's purpose, to determine whether that purpose is tied to traditionally protected First Amendment rights, or if the purpose would be significantly impaired by forcing non-discrimi-

2. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). This "right of association" was first recognized by the United States Supreme Court in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), in which the Court reasoned that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly."
3. 468 U.S. 609 (1984).
4. 481 U.S. 537 (1987).
5. 487 U.S. 1 (1988).
6. *Roberts*, 468 U.S. at 621.
7. *Id.* at 622

nation. If the group's purpose is so tied to First Amendment freedoms, the group may be exempt from the public accommodations law. On the other hand, the state may nonetheless be able to justify infringement upon the group's constitutional rights in the event that the state can articulate a compelling interest that the state is attempting to protect by way of the infringement.

Through the lens of *Dale v. Boy Scouts of America*,[8] this article will attempt to show that, in light of the *Roberts* trilogy, the application of public accommodation laws against a group such as the Boy Scouts is an unconstitutional infringement of the group's right of "expressive association." In addition to disregarding the Boy Scouts' right of expressive association, an application of such statutes may also violate free speech principles embodied within the First Amendment. The *Dale* Courts concluded that the Boy Scouts was a public accommodation within the ambit of New Jersey's public accommodation statute.[9] Whether this is a correct application of the statute, as it has been interpreted by that state's highest court, I leave for another day.

The focus of this article is the erroneous ruling of the New Jersey Supreme Court in holding that the State of New Jersey had a "compelling interest in eliminating discrimination based on sexual orientation"[10] sufficient to justify infringement of the Boy Scouts' right of "expressive association" as recognized by the Supreme Court in *Roberts*. An analysis of how the New Jersey Supreme Court erred in its application of the statute against the Boy Scouts follows an observation of the background of the right of "expressive association" as it currently stands, as well as a brief examination of the facts in *Dale*. The analysis will submit that not only did the *Dale* Courts unconstitutionally infringe the rights of expressive association belonging to the Boy Scouts, but the decisions infringed upon the Boy Scouts' free speech rights as well. In reaching their conclusions, the *Dale* Courts also misapplied the "compelling interest" analysis in finding that the state of New Jersey had sufficient justification for infringement of those rights. The article concludes with a brief forecast of what is to come should states seek to "overapply" public accommodation statutes to groups such as the Boy Scouts of America.

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8. 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

   Shortly before this article went to press, the U.S. Supreme Court granted cert to *Dale*. *See* Dale v. Boy Scouts of America, No. 99-699, 2000 WL 21144 (U.S. Jan. 14, 2000).

9. *See* Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

10. *Id.* at 1228.

II. BACKGROUND OF THE RIGHT OF EXPRESSIVE ASSOCIATION: THE *"ROBERTS* TRILOGY"

The United State Supreme Court has clearly recognized that collective expression is a right protected by the Constitution. Specifically, the Court has held that the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[11] The Court has also noted that "[t]he freedom to associate applies to the beliefs we share, and to those we consider reprehensible."[12] Furthermore, the freedom to associate with certain individuals "plainly presupposes a freedom not to associate" with other persons.[13] This freedom "not to associate" is at the heart of the controversy in cases such as *Dale*, in which groups are seeking to invoke their "right to discriminate."

The Court's initial foray into the constitutional difficulties inherent in cases such as *Dale* took place in *Roberts v. United States Jaycees*.[14] *Roberts* forced the Court to confront the constitutional difficulties raised by applying anti-discrimination legislation to private organizations. The issue confronting the *Roberts* Court was whether the State of Minnesota could apply its public accommodations law to the Jaycees and compel the Jaycees to admit women to "full member status."[15] The Supreme Court held that the state was justified in forcing the Jaycees to do so, despite invocation of the First Amendment by the Jaycees.[16]

Roberts employed a balancing test, balancing the State's interest in eliminating discrimination based on gender against the Jaycees' purported "right to discriminate" via a selective membership policy.[17] Before actually applying the balancing test, Justice Brennan correctly recognized that the "decisions have referred to constitutionally protected 'freedom of association' in two distinct senses."[18] Brennan pointed out that the first line of decisions dealt with peoples' decisions to "enter into and maintain certain intimate human relationships," which he later tabbed the right of "intimate association."[19] Realizing that the right of intimate association was not at issue in *Roberts*, Brennan then explained that the First Amendment also protects "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, . . . and exercise of

11. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).
12. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).
13. *Id.* at 623 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977)).
14. 468 U.S. 609 (1984).
15. *See Roberts*, 468 U.S. at 614.
16. *See id.* at 631.
17. *See id.* at 612.
18. *Id.* at 617.
19. *Id.*

religion."[20] Brennan labeled this aspect of the penumbral right "expressive association."[21]

Of the many possible forms governmental interference with free association may take, one of the most troubling is interference with the group's membership policies. The *Roberts* Court recognized that by requiring the Jaycees to admit women as full voting members, the state infringed the rights of the Jaycees in that the state was attempting to interfere with the internal organization or affairs of the group.[22] Brennan appreciated the intrusion in *Roberts*, by pointing out that the Minnesota law "may impair the ability of the original members to express only those views that brought them together."[23] At one point in his opinion, Brennan even went so far as to note that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[24] Justice O'Connor's concurring opinion classified such a threat as an even larger one, writing "[p]rotection of the association's rights to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[25]

Justice O'Connor urged the Court to recognize a distinction based on whether the group was formed predominately for expressive purposes or for commercial purposes. She would have provided more protection for the former and less protection for the latter.[26] Justice O'Connor also provided, in her concurrence, what may have been a premonition that application of these statutes to groups such as the Boy Scouts may indeed go beyond violating the right of expressive association. O'Connor correctly recognized that such statutes may also violate the Free Speech rights of some groups to which the statutes are applied.[27] Under either Brennan's or O'Connor's approach, how-

20. *Id.* at 618.
21. *See id.*
22. *Id.* at 623.
23. *Id.*
24. *See id.* at 623.
25. *See* Roberts v. United States Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring).
26. *See id.* at 637-38 (O'Connor, J., concurring).
27. Justice O'Connor provided in her concurrence that

> [A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. *Protection of the message itself is judged by the same standards as protection of speech by an individual.* Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.

Id. at 633 (O'Connor, J., concurring) (emphasis added).

ever, at least one thing is clear; in certain instances, a right of expressive association will be protected.

The Court qualified its recognition of the right of "expressive association," by noting that "[t]he right to associate for expressive purposes is not . . . absolute."[28] The Court continued by noting "[i]nfringements 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 means significantly less restrictive of associational freedoms."[29] The Court concluded that Minnesota's compelling interest in "eradicating discrimination *against its female citizens* justifies the impact that application of the statute to the Jaycees may have on . . . associational freedoms."[30] The *Roberts* Court noted that the Jaycees failed to demonstrate that the statute imposed any serious burdens on the freedoms of expressive association because the statute did not require the organization to change its creed, did not alter any *symbolic message* of the organization, and did not impose restrictions on the organization's ability to exclude individuals with ideologies or philosophies differing from those of existing members.[31] Application of the statute at issue in *Roberts* only required that female citizens be treated the same as male citizens as far as membership status within the group. Application of the statute to the Jaycees would not affect any First Amendment rights of the Jaycees in such a manner and to such an extent that the selective membership policy resulting in discrimination against women might be justified.

Holding that any infringement upon the right of expressive association in *Roberts* was justified by a compelling interest, the Court did not provide a definitive answer as to how to recognize valid invocations of that right. The Court, however, did take time to note "factors that may be relevant" to such a determination.[32] *Roberts* did not hint at the relative importance of any one factor nor did it indicate whether the list of possibly relevant factors is exclusive, noting only that other factors "may be pertinent" in a particular case. Basically, the approach taken by the Court in *Roberts* leaves the Court with plenary

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

29. *Id.*

30. *Id.* (emphasis added).

31. *See id.* at 627.

32. *Id.* at 620. Justice Brennan wrote that each case would require careful assessment of where the particular association is located on a spectrum from the most intimate, to the most attenuated of personal attachments. "We need not mark the potentially significant points on this terrain with any precision. We note only that factors that *may* be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* (emphasis added).

authority to determine, on an *ad hoc* basis, what associations will be accorded constitutional protection.[33]

Only three years after the *Roberts* decision, the Court was once again confronted with the issue of whether a public accommodations law could constitutionally infringe upon the freedom of expressive association. This second lawsuit, involving the Rotary Club, was brought pursuant to language in Brennan's opinion that suggested that a group much smaller than the Jaycees, such as the Kiwanis, might be entitled to more protection.[34] In *Board of Directors of Rotary International v. Rotary Club*,[35] the Court was asked to strike down a California statute that required the Rotary Clubs to admit women. As in *Roberts*, the Court indicated that there was no evidence indicating that if forced to admit women, the Rotary Club would be affected in a significant way and would be thwarted in their attempt to "carry out their *various* purposes."[36] The Court once again held that the state had a compelling interest in eradicating discrimination against women. Consequently, if there was any infringement on the rights of expressive association of the Rotary Club by forcing them to admit women, the incidental infringement was justified by this compelling interest.[37] *Rotary* was the Court's way of reiterating that constitutional protection of selective membership practices would only be warranted if a group's purpose is tied to the advancement of beliefs and ideas that might be significantly disrupted if forced to adhere to the non-discrimination statute or if forced to implement non-discriminatory membership policies. As applied to the Jaycees or the Rotary Club, the outcome of a case under such a balancing test is clear because the Club's purpose will not be inhibited when forced to comply with the public accommodation statute. In other words, the *Roberts* balancing test is tipped clearly in favor of protecting women from unfounded discrimination. However, the outcome should be just as clear when applied to a group such as the Boy Scouts of America and the balance is just as clearly tipped in favor of its interests.

The final decision in the *Roberts* trilogy is *New York State Club Ass'n v. City of New York*,[38] decided only a year after *Rotary*. In *New*

33. *See generally* Neal E. Devins, *The Trouble with* Jaycees, 34 CATH. U. L. REV. 901 (1985).

34. Brennan noted that the distinction drawn by the Minnesota Supreme Court between the Kiwanis and the Jaycees was enough to dispose of the Jaycees' contention that the statute was overbroad. Brennan also noted that lower court's reference to the Kiwanis Club was merely an illustrative reference to the "private" prong of the test. *See* Roberts v. United States Jaycees, 468 U.S. 609, 630 (1984).

35. 481 U.S. 537 (1987).

36. *Rotary*, 481 U.S. at 548.

37. *See id.* at 549.

38. 487 U.S. 1 (1988).

York State Club Ass'n, the Court was urged to declare a local ordinance that compelled private athletic clubs and restaurants to allow access to individuals who were members of protected classes facially invalid because it violated the freedom of expressive association. The Court, per Justice White, declined to do so because the ordinance on its face "did not require the clubs to 'abandon or alter' any activities protected by the First Amendment."[39] In upholding the statute as facially valid, the Court qualified its opinion by noting that it was

> conceivable . . . that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.[40]

After *New York State Club Ass'n*, the Court seemed not only to have left the door open for a group such as the Boy Scouts, but at the same time seemed to send such a group nothing short of a written invitation to the "expressive association" party. Unfortunately, the New Jersey Supreme Court in *Dale* saw fit to be the doorman at the United States Supreme Court's party, and turned the Boy Scouts away by overgeneralizing statements the Court had made throughout the *Roberts* trilogy. Furthermore, the *Dale* Court relied upon propositions never before employed by the United States Supreme Court to override the Boy Scouts' freedom of expressive association, as well as their freedom of speech.

III. *DALE V. BOY SCOUTS OF AMERICA*: THE (MIS) APPLICATION OF THE ANTI-DISCRIMINATION STATUTE AGAINST BOY SCOUTS

The decision in *Dale* dealt with the revocation by the Boy Scouts of America of James Dale's application to become a Boy Scout Leader and to maintain his adult membership. After becoming aware that Dale was a leader in a local homosexual organization, the Boy Scouts revoked his adult registration, thereby precluding any possibility of his ever becoming a voluntary Scoutmaster.[41] The Boy Scouts claimed that membership as a leader in the organization was a privilege, and that homosexuality was contrary to the beliefs of the organization.[42] In its revocation of Dale's membership, the Boy Scouts relied upon internal policy statements dating back as far as March 17, 1978, in which the organization declared that "an individual who openly declares himself to be a homosexual would not be selected as a volunteer

39. *New York State Club Ass'n*, 487 U.S. at 13.
40. *Id.*
41. *See* Dale v. Boy Scouts of America, 706 A.2d 270, 275-76 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
42. *See id.* at 275.

Scout leader."[43] According to the National Boy Scouts of America, the "requirements that a scout be 'morally straight' and 'clean' are inconsistent with homosexuality."[44] The Boy Scouts also relied upon written declarations by the organization that leaders were viewed as role models for younger scouts and that it did not want to hire leaders who continue to interpret the Scout Oath or Law differently than the organization itself.[45]

Both *Dale* Courts acknowledged the importance of the Boy Scouts' policies. These written policies were acknowledged by the inferior appellate court when it acknowledged that the 1972 Scoutmaster's Handbook emphasized the leader's duty as a role model. The court recognized that the leaders' role was to provide a good example of what a man should be like. The *Scoutmaster Handbook* also stated that "[w]hat you do and what you are may be worth a thousand lectures and sermons."[46] The appellate court continued, quoting from the *Scoutmaster Handbook*, "[w]hat 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.*"[47] Furthermore, it was acknowledged by the New Jersey Supreme Court that the "Boy Scouts' activities are designed to build character and instill moral principles."[48] However, the existence of those policies did not prevent James Dale from pursuing reinstatement of his membership.[49]

Dale claimed that the denial of his membership application violated the New Jersey Law Against Discrimination.[50] The Boy Scouts countered that it would be unconstitutional to apply the law against them because it would infringe their rights of expressive association

43. *Id.* at 276.

44. *Id.*; *see also* Dale v. Boy Scouts of America, 734 A.2d 1196, 1224 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

45. *See* Dale v. Boy Scouts of America, 706 A.2d 270, 276 (N.J. Super. Ct. App. Div. 1998); *see also* Dale v. Boy Scouts of America, 734 A.2d 1196, 1205 n.4, & 1224 n.12 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

46. Dale v. Boy Scouts of America, 706 A.2d 270, 276 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

47. *Id.* at 276 (emphasis supplied).

48. Dale v. Boy Scouts of America, 734 A.2d 1196, 1228 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

49. The *Scoutmaster Handbook*, which Dale would be asked to comply with as a Scoutmaster, cautions leaders to avoid inconsistencies between their statements and actions: "practice what you preach . . . . The most destructive influence on boys is adult inconsistency and hypocrisy." *See* Petition for Certiorari at 3, Dale v. Boy Scouts of America, (U.S. Oct. 25, 1999) (No. 99-699).

50. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1205 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

and free speech.[51] The New Jersey Appellate Court accepted certain factual assertions of the Boy Scouts, taking issue with the proposition that the application of the statute would impair its ability to exercise freedoms protected by the First Amendment.[52] Nevertheless, the appellate court indicated that while the right of expressive association may be violated by applying the law against the Boy Scouts, the infringement was justified by the state's compelling interest in "eradicating discrimination."[53] The New Jersey Supreme Court agreed, noting that "even if Dale's membership 'works some slight infringement on . . . [the Boy Scouts'] members' right of expressive association,' we find that the 'infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination' based on sexual orientation."[54] About the only aspect of the case the New Jersey Court correctly decided was that it delineated the proper balancing test to be applied, that is, the compelling interest the state urged upon the court compared to the club's right of expressive association.[55] However, in its application of that test, the *Dale* Courts gave the compelling interest analysis a new look, and made freedom of expressive association basically non-existent in New Jersey as a defense to applications of the public accommodations statute.

A. Infringement of Boy Scouts' Right of Expressive Association and Free Speech

In *Dale*, the Boy Scouts argued that its selective membership and leadership policies were protected as part of their constitutional right of freedom of expressive association.[56] Its argument was essentially, as referred to previously, that they had a constitutional "right to discriminate" by implementing a selective membership policy. The Boy Scouts thought that it should be able to admit only those individuals who would follow the organization's policies, or at a minimum, not actively protest the positions taken by the organization on controversial issues such as homosexuality.[57] As indicated by the background of

51. *See id.* at 1206.
52. Dale v. Boy Scouts of America, 706 A.2d 270, 287 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
53. *See id.*
54. Dale v. Boy Scouts of America, 734 A.2d 1196, 1228 (N.J. 1999) (citations omitted), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
55. *See id.* at 1223.
56. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1219 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
57. Dale testified at a deposition that the believes that homosexuality "is not immoral," and that while he was at college be became "deeply involved in gay rights issues and maintained a high profile on campus." Petition for Certiorari at 6, Dale v. Boy Scouts of America, (U.S. Oct. 25, 1999) (No. 99-699).

the freedom of expressive association and the *Roberts* trilogy, however, there is an inherent conflict in cases such as *Dale* that involves "two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict."[58] It follows that any resolution of the issue must therefore turn on a combination of the Court's analysis in the *Roberts* trilogy and the corresponding equality interests being violated by the discriminatory associational policy. The latter is eventually protected in cases such as *Dale* through the compelling interest aspect of the *Roberts* balancing test.

The first inquiry that must be made in this type of case is just how far the right of association will be stretched by the Court if faced with the issue once again. In assessing such claims, one must keep in mind that *New York State Club Ass'n* declared the statute involved therein only facially valid. The Court left open the invitation for a club to make a fact-based claim that it had the requisite distinctive characteristics to claim expressive association protection.[59] Despite the pattern of the *Roberts* trilogy of restricting the right of expression of association, the Court's language in *New York State Club Ass'n* "suggests that the Court will go no further in restricting associational rights and may possibly allow a more expansive" reading of associational freedom.[60] *Dale* presents the Court with such an opportunity.

The *Dale* Courts held that it could not "convincingly be argued that the Law Against Discrimination's proscription against discrimination based upon 'affectional or sexual orientation' impedes [the Boy Scouts'] ability to express its collective views on scouting, or to instill in the scouts those qualities . . . to which the Boy Scouts has traditionally adhered."[61] Having so limited the views the Boy Scouts were seeking to protect, the *Dale* Courts then proceeded to ignore the real question with which they were faced, and immediately framed the issue as whether the Boy Scouts discriminated on the basis of sexual orientation in violation of the Law Against Discrimination.[62] In framing the issue this way, the New Jersey Appellate Court assumed that the Boy Scouts' policy of excluding homosexuals from its leadership

58. William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. REV. 68, 69 (1986).

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

60. Anthony L. Leto, *New York State Club Association v. City of New York: Ending Gender-Based Discrimination in Private Clubs—Are Associational Rights Still Protected?*, 16 HASTINGS CONST. L.Q. 623, 632 (1989).

61. Dale v. Boy Scouts of America, 706 A.2d 270, 288 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

62. *See id.* at 288-89; Dale v. Boy Scouts of America, 734 A.2d 1196, 1218 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

ranks must be based on some "sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas about the homosexual lifestyle,"[63] and the New Jersey Supreme Court concluded that Dale's exclusion "constituted discrimination based *solely* on his status as an openly gay man."[64] Both courts then proceeded to analyze the issue in terms of having no evidence that the assumptions of the Boy Scouts were warranted by empirical findings.

The *Dale* Courts "delivered a sermon about 'the human price of [ ] bigotry'"[65] and overlooked the fact that *Roberts* involved the desire of the Jaycees to exclude women as members. In *Dale*, the Boy Scouts sought not to exclude merely a member, but to exclude an individual possessing views opposite those held by the organization from holding a leadership post within the organization.[66] The New Jersey Supreme Court even acknowledged that "protected expression may . . . take the form of quiet persuasion, inculcation of traditional values, instruction of the young, . . . [and] the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."[67] The Court stated that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members."[68] Furthermore, "Boy Scouts' activities are designed to build character and instill moral principles."[69]

Such revelations notwithstanding, the New Jersey Supreme Court flatly stated that "the reinstatement of Dale does not compel Boy Scouts to express any message."[70] The problem with both courts' analyses is, of course, that the only assumptions made in this case were not made by the Boy Scouts, but by the courts themselves. The policies of the Boy Scouts were not, as the *Dale* Courts assumed, seeking to discriminate against all homosexuals in society. The Boy Scouts only took the position that homosexuality was in direct contravention

63. Dale v. Boy Scouts of America, 706 A.2d 270, 289 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed,* 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

64. Dale v. Boy Scouts of America, 734 A.2d 1196, 1225 (N.J. 1999) (emphasis added), *petition for cert. filed,* 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

65. Petition for Certiorari at 25, Dale v. Boy Scouts of America (U.S. Oct. 25, 1999) (No. 99-699).

66. Dale v. Boy Scouts of America, 734 A.2d 1196, 1205 (N.J. 1999), *petition for cert. filed,* 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

67. *Id.* at 1223.

68. *Id.* at 1225.

69. *Id.* at 1228.

70. *Id.* at 1229.

to portions of the Scout Oath[71] and Scout Law,[72] and consequently would not admit homosexual activists as adult members or leaders.

The *Dale* Courts must have thought that the only way they could balance the interests and reach the result they wanted to reach was to find an interest of the Boy Scouts that *might be* involved in the case, as in *Roberts* where the Court declared that the Jaycees *might be* forced to change their creed were they forced to admit women.[73] In their haste to reach such a conclusion and familiarize their case with *Roberts*, the *Dale* Courts ignored evidence as to how the Boy Scouts would actually be affected by such an application of the public accommodation statute. Notwithstanding evidence that the Boy Scouts were seeking to do more than merely exclude a member who might force them to change their creed, the New Jersey Supreme Court proceeded to analyze the issue by ignoring the impact of compelling Dale's reinstatement, as they analyzed the issue as if Dale were merely a *member* of the Boy Scouts, *not a leader*.[74]

Even James Dale himself stated that he admired the purposes for which the Boy Scouts stand—"teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility."[75] Despite all such indications that the Boy Scouts sought to exclude Dale as a leader because his view on homosexuality did not comply with those BSA required of its leaders, the New Jersey Court justified its position by stating "Boy Scouts perceived Dale's *membership* as interfering with its views on 'the morality of homosexual conduct.'"[76] One can only wonder why the Court often ignored, or at the least significantly undermined, the fact that Dale was actually seeking to be a Boy Scout leader, a position that was to be held with knowledge of a person's status as being quite possibly the only role model for some Scouts.[77] Clearly, the Scouts were seeking to prevent the teaching of moral values in their organization by someone holding values inimical to those held by the Boy Scouts,

71. The Scout Oath states in part, "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*." WILLIAM BILL HILLCOURT, THE OFFICIAL BOY SCOUT HANDBOOK 27 (9th ed. 1979) (emphasis added).

72. "A Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, *Clean* and Reverent." HILLCOURT, *supra* note 71, at 31 (emphasis added).

73. *See* Roberts v. United States Jaycees, 468 U.S. 609, 627-28 (1984).

74. *Id.* at 1225.

75. Dale v. Boy Scouts of America, 734 A.2d 1196, 1225 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

76. *Id.* at 1226 (emphasis supplied).

77. *See supra* notes 46-49 and accompanying text.

not just to exclude unpopular members.[78] In other words, the Scouts' purpose is tied to the advancement of beliefs and ideas that might be significantly disrupted if forced to implement "non-discriminatory" membership policies.[79]

The New Jersey Supreme Court also noted and relied upon the fact that the Boy Scouts is not very selective in its membership, and reasoned that since the Boy Scouts solicits members from the public at large, their claim of expressive association must fall outside the ambit of *Roberts* protection.[80] Basically, the *Dale* Courts sought to implement one of the patent ambiguities in the United States Supreme Court's opinion in *Roberts*. The *Dale* Courts focused on a few of the factors delineated by Justice Brennan (size and selectivity) and noted that since the Boy Scouts is a large group with members nationwide, and is not very selective in soliciting members, it must be the type of group referenced in *Roberts*, whose freedom of association must be outweighed by the interests of the state in eradicating discrimination. However, the *Dale* Courts conveniently did not address whether the *Roberts* list was to be exhaustive, nor did they even consider all of the factors listed in Justice Brennan's opinion.

One problem with each of the *Dale* Courts' analysis is that both completely ignore the thrust of the *Roberts* trilogy altogether, especially the Supreme Court's latest pronouncements in *New York State Club Ass'n*. One consistent theme, articulated by the Court in each case in the trilogy was that the accommodations laws as applied to the groups in the respective cases would not cause the groups "'to abandon or alter' any activities protected by the First Amendment,"[81] would not impose restrictions upon "the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members,"[82] or would not "impede the organization[s]

78. The Boy Scouts have acknowledged that the issue of whether homosexual conduct is moral or immoral is controversial, and that many people of good will believe that the Boy Scout's position is misguided. However, the Boy Scouts is of the position that such controversial questions of personal sexuality are best tested and resolved within the private marketplace of ideas. "We can respect the idea of gay men and lesbians not to have traditional morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouts, at the expense of First Amendment freedoms of Speech and Association." Petition for Certiorari at 28-29, Dale v. Boy Scouts of America, (U.S. Oct. 25, 1999) (No. 99-699).

79. *See supra* notes 11-40 and accompanying text.

80. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1219-28 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

81. New York State Club Ass'n, 487 U.S. 1, 13 (1988); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); Board of Dirs. of Rotary Int'l v. Rotary Club 431 U.S. 537, 548-49 (1987).

82. *Roberts*, 468 U.S. at 627.

. . . [from] disseminat[ing their] preferred views."[83] Not only does the application of the statute against the Boy Scouts run afoul of all of these caveats to the rules in the *Roberts* trilogy, it also forces the association to propound a message entirely inconsistent with its purpose and viewpoints, as well as creating the impression that it now approves of homosexuality after nearly 100 years of avowed disapproval. In other words, the application of the statutes against the Boy Scouts violates not only its rights of expressive association, but also its free speech rights.

The Boy Scouts has taken the position that homosexuality is inconsistent with the provisions in the Scout Law and Scout Oath which provide that the scout must be "morally straight" and "clean."[84] The organization has issued written policy statements confirming this as its position since at least 1978, as recognized (and later ignored in the record) by the *Dale* Courts.[85] Furthermore, anyone who has ever been a member or attended a meeting of the Boy Scouts knows that prior to every troop meeting the scout must stand at attention and recite the Scout Oath and the Scout Law. Therefore, the interpretation given to these distinct provisions of the Scout Law by the organization itself should be deemed to, if nothing else, represent the philosophy of the organization as according to these two provisions in the respective creeds.

The New Jersey Courts have compelled the Boy Scouts to admit a leader who has openly and actively participated in demonstrations contrary to the organization's own view on homosexuality.[86] Dale's views are also contrary to the Boy Scouts' interpretation of the Scout Law and Scout Oath, which brings and keeps the scouts together. The State of New Jersey has in effect imposed a restriction on the "organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[87] Moreover, it would appear as if the Boy Scouts has suddenly been forced to alter its policies regarding homosexuality.

As previously indicated, the Boy Scouts essentially sought to exclude an individual who had ideologies and philosophies different from

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83. *Id.*

84. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1202 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

85. *See id.* at 1216.

86. Dale, by his own description, is a sexually active homosexual and was prominent in gay rights causes at Rutgers University. He has stated publicly that he disagrees with [the Boy Scouts'] moral position against homosexual conduct and that he 'owes it to the organization to point out to them how bad and wrong this policy is.

Petition for Certiorari at 14-15, Dale v. Boy Scouts of America (U.S. Oct. 25, 1999) (No. 99-699).

87. *Roberts*, 468 U.S. at 627.

those of the organization itself. Therefore, it is clear that the *Dale* case is not directly within the ambit of the *Roberts* analysis, but instead falls within the exception consistently recognized throughout the trilogy. Basing its decision on the fact that the position against homosexuality is not what brought the Boy Scouts together, the New Jersey appellate court noted that the "anti-homosexuality" view was not the *collective view* of the members of the organization.[88] The problem with this approach is that the Supreme Court has never required that a policy in an organization be the collective view of its members in order to be entitled to constitutional protection. Rather it has only required that the policy at issue be the view of the organization itself. There is no question that the Boy Scouts of America believes homosexuality is contrary to its own Scout Oath and Scout Law. The fact that there may be some things over which individual members of the group disagree does not mean that the organization cannot take a stance on that particular issue.

Courts may, as did the *Dale* Courts, focus on the fact that there may be members of the Boy Scouts who hold views contrary to those of the organization, especially on issues as controversial as homosexuality. Taking this proposition as far as the New Jersey Supreme Court, and claiming that because a view is not the collective view of all the members of the group that it therefore must not be a central purpose of the group itself, turns the constitution on its head. First of all, the fact that a member or small subset of a group does not agree with a position taken by organization does not in and of itself obviate the position taken by the organization on that issue. The members with the contrary view can always exercise their right "not to associate" and form their own organization. Furthermore, just because those attending the meeting chose to attend and adhere to the views of the Boy Scouts, or at least to remain silent about their own views, a court can not justifiably infringe the rights of that organization. Even if someone wants to join, but does not want to endorse the same view as the group, the group should not be compelled to endorse the view of the dissenter, especially when the dissenter has actively protested in the same community against the stance taken by the group itself.[89]

The Supreme Court has recognized that "a narrow, succinctly articulable message is not a condition of constitutional protection."[90] However, even if this were a requirement, the position taken by the Boy Scouts would still be protected since its position is arguably succinct, articulable, and clear. The New Jersey Supreme Court reasoned

88. Dale v. Boy Scouts of America, 734 A.2d 1196, 1223-24 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

89. *See supra* notes 78, 86.

90. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995).

that since not all of the scout leaders and scouts adhered to the organization's viewpoint on homosexuality, the Boy Scouts could not argue that its purpose was to exclude individuals who do not share the views that the club's *members* wished to promote.[91] However, the court did not address the exclusion of leaders who do not share the views that the organization itself wishes to propound, and by not doing so the court was clearly mistaken. By reasoning that not all of the members held the same view, and therefore that the message was not articulable by the Boy Scouts, the court effectively provided the Boy Scouts with a new policy it must adhere to under the state anti-discrimination law. In this regard, *Dale* rewrites years of First Amendment jurisprudence with one swift stroke of the pen by suddenly requiring constitutional protections to be forfeited when a speaker wishes to combine multifarious voices. Such a decision cannot withstand constitutional scrutiny.

Second, by imposing a requirement that the view of the organization must necessarily be the collective view of all the members, the court effectively limits the rights of a large group to express any view at all. It will be unequivocally difficult for a group the size of the Boy Scouts to take a stance on any issue of public significance because there may always be a member somewhere that holds an opinion different from that of the organization. The Supreme Court has noted, however, that a "speaker does not forfeit constitutional protection simply by combining multifarious voices."[92] The fact that the Boy Scouts have allowed some people to join who may hold views opposite those of the organization does not mean that the organization cannot express and stand behind its own ideas. The problem with admitting Mr. Dale was not that he held opposite viewpoints, but that he was a local leader in homosexual activist groups that endorsed philosophies different from those of the Boy Scouts.[93] The Boy Scouts should be allowed "creation of [its] voice"[94] and to submit to the marketplace of ideas its own positions on controversial issues such as homosexuality.

By compelling a group exercising expressive association, such as the Boy Scouts, to admit members with such different philosophies, the court goes far beyond infringing the right of expressive association. The court essentially compels the Boy Scouts to propound, albeit symbolically, a particular point of view with which it disagrees. In other words, not only has the group been forced to admit members with a "different philosophy," but its has also been compelled to pub-

91. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1223-24 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

92. *See Hurley*, 515 U.S. at 569.

93. *See supra* note 86.

94. *See* Roberts v. United States Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring).

licly endorse a viewpoint with which it disagrees.[95] For years, the Supreme Court has said that this is something that a state cannot constitutionally do, at least not without first satisfying a strict scrutiny analysis.

The Supreme Court has recognized that "[s]ymbolism is a primitive, but effective way of communicating ideas."[96] Compelling the Boy Scouts to admit an individual, such as a homosexual activist, who has openly and actively advocated an adverse viewpoint on a controversial issue, clearly compels the Boy Scouts to symbolically agree with ideas that individual has been actively endorsing. However, the New Jersey Supreme Court contended otherwise.[97] Since the Boy Scouts has had a constant stance against homosexuality, the only inference that can be drawn when it admits an individual who has openly and actively protested that position is that the Boy Scouts no longer adheres to its views, especially when that person is admitted as a leader. In essence, by forcing the Boy Scouts to admit Dale, not only as a scout but also as a leader, New Jersey has forced the Boy Scouts to symbolically endorse the position that homosexuality is commonplace in today's society and that it in no way conflicts with the Scout Oath or the Scout Law. That, however, was *not* the actual position of the Boy Scouts.

This logic can be taken a step further. The Boy Scouts has openly declared that leaders are viewed as role models, and Mr. Dale has acknowledged as much.[98] By being forced to admit a homosexual activist as a leader, the Boy Scouts opens itself up to the public interpreting this action as its tacit approval of homosexuality. It appears that by admitting Dale as a leader, the Boy Scouts is admitting that Dale is viewed as a sufficient role model for younger Scouts.[99] Therefore, the message sent by the Boy Scouts has been altered not

95. Such an approach directly contravenes the language of Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), where he stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force to citizens to confess by word or act their faith therein." When the state applies these statutes to the Boy Scouts, it certainly compels it to "confess by . . . act their faith" in the position taken by the State that homosexuals are entitled to heightened protection. This thereby conveys to the public that it no longer looks with disfavor upon that sexual orientation.

96. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

97. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699). The court stated "We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality." *Id.* The Court went on to state that "reinstatement of Dale does not compel Boy Scouts to express any message." *Id.*

98. *See* Petition for Certiorari at 16, Dale v. Boy Scouts of America (U.S. Oct. 25, 1999) (No. 99-699) ("Dale acknowledges that the Scoutmaster serves as a 'role model for the younger Scouts and as a counselor to the older Scouts.'").

99. *See supra* notes 11-40 and accompanying text.

only to the enrolled Scouts, but also to the public at large from which it solicits membership. In other words, not only has speech within the organization been altered, but the organization's speech within the community has also been altered. Such considerations notwithstanding, the New Jersey Supreme Court concluded, "the reinstatement of Dale does not compel Boy Scouts to express any message,"[100] and "on these facts, we do not find forced speech."[101]

The Supreme Court has consistently held that such "compelled speech" circumvents the protections provided by the First Amendment. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,[102] the Court invalidated coerced access to the private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond."[103] The Court also held that if "the government [were] freely able to compel . . . speakers to propound . . . messages with which they disagree, . . . protection [of speech] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."[104] Nine years later, the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[105] noted that when "dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[106] The *Hurley* Court concluded that "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."[107] Effectively, by applying the Law Against Discrimination against the Boys Scouts as in *Dale*, New Jersey has eviscerated the Boy Scouts' freedom of speech and has compromised the Boy Scouts' autonomy over the message it sends to Scouts and to the public. The Boy Scouts, and only the Boy Scouts, should be given the choice to propound the view it wishes to send. Since the statute struck down in *Hurley* was the Massachusetts version of the statute challenged in *Dale*, the results should also have been the same.

Towards the end of its unanimous opinion in *Hurley*, the Court focuses on its opinion in *New York State Club Ass'n*, and notes that in that case it recognized that the state did not prohibit exclusion of those views at odds with positions espoused by general club members. The Court noted that although the clubs in that case provided public

100. Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
101. *Id.*
102. 475 U.S. 1 (1986) (plurality opinion).
103. *Pacific Gas & Elec. Co.*, 475 U.S. at 15 (1986).
104. *Id.* at 16.
105. 515 U.S. 557 (1995)
106. *Hurley*, 515 U.S. at 576.
107. *Id.* at 575.

benefits to which a state could ensure equal access, the clubs were also engaged in expressive activities. But the Court correctly pointed out that the compelled access did not trespass on the organization's message itself. The Court then noted that "[i]f we were to analyze [*Hurley*] strictly along those lines, GLIB would lose." The Court pronounced that

> Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.[108]

It would seem that the *Hurley* Court did all of the work for the *Dale* Courts. However the New Jersey Supreme Court saw fit to ignore the Supreme Court's guidance in *Hurley*. Mr. Dale's views were not only at odds with the views of some of the club's members, but also at odds with the views of the club itself and the club should have been allowed to exclude him.

The *Dale* Courts struggled with the *Hurley* argument urged upon them by the Boy Scouts, and then attempted to distinguish *Hurley*. The New Jersey Appellate Court did so on the grounds that "both the parade and GLIB's participation [in *Hurley*] were pure forms of speech."[109] The New Jersey Supreme Court agreed, concluding that "Boy Scout leadership is not a form of 'pure speech' akin to a parade."[110] Both courts noted that the public accommodation law mandated only access to membership in the Boy Scouts, reasoning that it did "not attempt, directly or indirectly, to hamper [the Boy Scouts'] ability to carry out these activities or *express its views*"[111] and that "permitting Dale to remain in a leadership position in no way prevents [the Boy Scouts] from invoking its rights as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[112] The only classification one can make of such reasoning in *Dale* is that it is flat wrong. The *Dale* Courts assume that the Boy Scouts' First Amendment rights are not at issue when the altered message is implicitly conveyed by example, rather than verbal articulation or by some sign or press release. However, this is

108. *Id.* at 580-81.

109. Dale v. Boy Scouts of America, 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

110. Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

111. Dale v. Boy Scouts of America, 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

112. Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

simply not the case because the Boy Scouts has been inhibited in expressing its own views by simultaneously being forced to endorse the contrary views of another, and the Boy Scouts' speaker autonomy has been significantly compromised.[113] Put another way, admitting *Dale* may have no effect on the Boy Scouts ability to speak or articulate a message, but by compelling Boy Scouts to accept *Dale's* application, New Jersey has compelled Boy Scouts to symbolically propound a message with which it disagrees.

The *Dale* Courts had to have been aware of the imposition on the Scouts' ability to express its message. There is no question that the New Jersey Supreme Court was aware of the Boy Scouts' *Scoutmaster Handbook* and the issues discussed therein, as the Court cites portions of the Handbook in its opinion.[114] Furthermore, the Supreme Court of New Jersey points out that Dale was denied membership because his application did not comply with the organization's guidelines for *leadership*.[115] Despite this acknowledgement that Dale was essentially applying to be a Boy Scout leader,[116] the New Jersey Supreme Court continuously analyzed the issue from the perspective of a denial of Dale's membership and inclusion in the organization. The court failed to appreciate what the issue really entailed, a denial by the Boy Scouts' of a leadership position to someone holding views opposite of those the organization wished to express.[117] Such a position completely undermines the realities of the situation, wherein the responsibility for inculcating values and other aspects of scouting is entrusted to the Scoutmaster, the position for which Dale applied.[118] By ignoring reality, the New Jersey Courts forced the Scouts to propound a message they would rather not send to members and the public at large.

When the New Jersey Supreme Court did acknowledge that Dale was applying to be a leader, it merely explained that it rejected the notion that "Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality. On these facts, we do not find forced speech."[119] However, the court provided very little explanation for its position, despite its earlier acknowledgement that a leadership position could involve expressive activities.[120] By taking such an ap-

113. *See supra* notes 92-108 and accompanying text.
114. Dale v. Boy Scouts of America, 734 A.2d 1196, 1203 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
115. *Id.* at 1205 (emphasis supplied).
116. *Id. at* 1225.
117. *Id.*
118. *See* Petition for Certiorari at 4, Dale v. Boy Scouts of America, (U.S. Oct. 25, 1999) (No. 99-699).
119. Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
120. *See supra* notes 46-48 and accompanying text.

proach, it must have been less difficult for the court to reach the result it desired. In reaching such a result, the Boy Scouts' First Amendment rights were swept under the doormat.

The bottom line is that whether the Boy Scouts' stand on homosexuality is fundamental to the organization's *creation* is basically irrelevant and, consequently the reasoning of *Dale* is entirely inconsistent with the Supreme Court's First Amendment jurisprudence. The Boy Scouts are entitled to profess what they believe, whether or not every member of the group agrees. Consequently, the application of the statute against the group violates its First Amendment rights. Recall that for the state to justify the intrusion, they must be able to delineate a compelling interest. In *Dale* the New Jersey Supreme Court makes a valiant attempt to delineate such an interest, but their analysis is off the mark as far as the law is concerned. The court stated, "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society."[121] It therefore found a compelling interest for New Jersey to "eradicate discrimination."[122] However, the United States Supreme Court has never recognized a compelling interest of such breadth, and *Dale* is simply not a case where the Court should do so, because it fits every exception to any rule that may suggest it might have been the proper case.

B. The Compelling Interest Analysis

As indicated earlier, cases such as *Dale*, and those in the *Roberts* trilogy, indicate the tension between freedom (the right of association) and equality (no discrimination).[123] The fact that the Supreme Court has adhered to the view that the right of freedom of expressive association is not absolute, however, properly balances these two interests in cases such as *Dale*. The Court has made clear that the State may overcome invocations of the "right to discriminate" by delineating a compelling interest. The following section of this article will examine the errors made by the *Dale* Courts in applying the compelling interest analysis.

The *Dale* Courts misapplied the compelling interest test for numerous reasons, all of which alone might be enough to justify the conclusion that the court erroneously compelled the Boy Scouts to reinstate Dale. The fact that there are so many errors in the analysis of *Dale*

121. Dale v. Boy Scouts of America, 734 A.2d 1196, 1227 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

122. *Id.* at 1228. The court also noted "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Id.* at (quoting Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 465, 478 (N.J. 1978)).

123. *See supra* note 58 and accompanying text.

indicates just how hard the New Jersey Courts tried to avoid running afoul of the Constitution, but in each attempt *Dale* runs afoul of not only the Constitution, but also logic. First, the *Dale* courts trespass upon the First Amendment rights delineated in the previous portion of this article without adequate justification. The Supreme Court has never recognized an interest in "eradicating discrimination" as broad as the interest relied upon by the *Dale* Courts to justify infringement of First Amendment rights.[124] Additionally, *Dale* finds an interest compelling enough to trump a party's constitutional rights but not compelling enough to trump the state's own discriminatory policies.[125] Finally, the *Dale* Court distinguishes *Hurley*, a case in which the United States Supreme Court all but assumed away the possibility that there may be a compelling interest in eradicating discrimination against homosexuals.[126] The bottom line is that the *Dale* Courts erred in finding a compelling interest because in its haste to do so, the courts must have been aware that the interest for which they were searching was nonexistent.

The New Jersey Supreme Court claimed that the state's compelling interest in eradicating discrimination was enough to justify intrusion upon the Boy Scouts' rights of expressive association.[127] The problem is that to survive the heightened scrutiny to which such violations of a party's constitutional rights must be subjected, the state must show that the group sought to be protected by application of the statute is an inherently suspect class, and that therefore the state's interest in eradicating discrimination against that group is compelling. Despite a valiant effort to protect homosexuals, the *Dale* opinion did not correctly apply the compelling interest standard to the New Jersey statute, and when the correct standard is applied, the statute cannot survive the heightened scrutiny under which it should have ultimately been examined.

The United States Supreme Court has never found a compelling interest in eradicating discrimination "across the board," as found in *Dale*. The Supreme Court has found compelling interests in eradicating discrimination for certain groups.[128] Homosexuals, however, have never been protected as such a "suspect class." The Court has allowed the governments to override individual constitutional rights when discrimination against such classes has been involved because the

124. *See infra* notes 134-39 and accompanying text.
125. *See infra* notes 140-48 and accompanying text.
126. *See infra* notes 149-59 and accompanying text
127. *See* Dale v. Boy Scouts of America, 734 A.2d 1196, 1228 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
128. The groups are race, alienage, and national origin; illegitimacy and gender are also suspect classes, but are not yet classes that give rise to a full-fledged "compelling interest" analysis. *See generally* Frontiero v. Richardson, 411 U.S. 677, 681 nn.7-9 (1973) (plurality opinion).

classes have what the Court has determined to be indicia of "suspectness." Such indicia include findings that the class has been saddled with disabilities, being subject to purposeful unequal treatment, and the class having been relegated to a position of political powerlessness.[129] As a class, homosexuals cannot satisfy the foregoing "tests" or indicia, and therefore the interest of New Jersey in eradicating discrimination on the basis of sexual orientation is less than compelling.

The most obvious indicator that homosexuals do not meet the Supreme Court's indicia of a suspect class is that it could not seriously be argued that homosexuals are politically powerless. First of all, homosexuals as a group have managed to persuade the New Jersey Legislature to amend the public accommodation law to include sexual orientation.[130] Also, New Jersey is not the only state in which homosexuals have managed to flex their political muscles. Homosexuals have managed to get statutes and ordinances passed in other states protecting them from discrimination.[131] Also, the class has not been shown to have been saddled with disabilities or subject to such harsh and purposeful treatment, at least not enough to qualify them as a suspect class. All in all, the group is not a suspect class and the Supreme Court's indicia of a suspect class cannot be met. Consequently, the constitutional rights of the Boy Scouts should survive the attempt by New Jersey to apply the statute since the state cannot set forth a compelling interest for infringing the Boy Scouts' constitutional rights. The *Dale* Courts must have realized this, because rather than attempting to justify classifying homosexuals as a suspect class, the *Dale* Courts broadened the interest at issue to that of "eliminating the destructive consequences of discrimination from our society,"[132] and later recharacterized that interest as "a compelling interest in eliminating discrimination based on sexual orientation."[133]

Any court confronted with finding a compelling interest to protect a certain class of individuals must begin their analysis with *Bob Jones University v. United States*.[134] *Bob Jones* involved a private school's attempt to deny enrollment to African Americans married to people

129. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

130. *See* Dale v. Boy Scouts of America, 706 A.2d 270, 277-78 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699). The New Jersey Appellate Court recognized that the statute was amended after the incident arose between Mr. Dale and the Boy Scouts, but it justified application of the statute by noting that the Boy Scouts never contended that the statute was inapplicable. In light of that oversight by the Boy Scouts, the court went ahead and applied the statute to compel Dale's membership.

131. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

132. Dale v. Boy Scouts of America, 734 A.2d 1196, 1227 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

133. *Id.* at 1228.

134. 461 U.S. 574 (1983).

outside of their own race. Also involved was a school disciplinary rule that prohibited interracial dating and marriage.[135] Once the IRS caught wind of the school's policy, they denied the school tax-exempt status. The University subsequently filed suit claiming that the denial of the status by the IRS infringed the school's rights under the Religion Clauses of the First Amendment.[136] The Supreme Court upheld the denial of tax-exempt status because it found a compelling interest in the United States' eradication of racial discrimination. Consequently, the infringement of the University's rights was justified.[137]

The Supreme Court found the necessary compelling interest evinced by "myriad Acts of Congress and Executive Orders, as well as every pronouncement of this Court [that] attest[s] a firm national policy to prohibit racial discrimination in public education."[138] The Court also reasoned that such a compelling interest justifies the denial of status because were the Court to allow the tax-exempt status, it would appear as if the United States Government were putting its imprimatur upon racial discrimination by allowing tax-exempt status to a school exercising such a policy. The Court added that it "would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared."[139] The Court upheld the governmental interest as compelling and allowed the denial of tax exempt status to the University, despite the First Amendment claims by the University.

Bob Jones notwithstanding, the reasoning applied therein cannot be applied to an application of public accommodation laws as in *Dale*. Clearly, there has been no national pronouncement by all three branches of government that discrimination against homosexuals should be proscribed. Also, the "imprimatur problem" that concerned the *Bob Jones* Court is not present in cases such as *Dale*. By allowing clubs to express their message to the public, there is no problem with the public interpreting the allowance of the discriminatory policy to be action by the state condoning such discrimination. The state would merely be allowing a speaker to express its views to the public. In *Dale*, that speaker is not the individual members of the Boy Scouts, but rather the Boy Scouts itself. Since the problems with allowing the tax exemption to Bob Jones University are not present in allowing the Boy Scouts' selective membership policies, it follows that eradicating

135. *Bob Jones*, 461 U.S. at 581.
136. *See id.* at 581-82.
137. *See id.* at 604.
138. *Id.* at 593.
139. *Id.* at 598.

discrimination against African Americans can qualify as a compelling governmental interest while eradicating discrimination against homosexuals cannot.

Aside from the fact that homosexuals have never qualified as a suspect class under the Supreme Court's jurisprudence, New Jersey has other problems reconciling the analysis of *Dale* with *Bob Jones*. *Bob Jones* relied upon the Supreme Court's hesitancy to allow policies in contravention of well-settled positions taken by the national government. Conversely, the *Dale* Court seemed to rely on an interest opposite that of state governmental policy since the state itself discriminates against homosexuals. If the state has a compelling interest in eradicating discrimination against homosexuals as delineated by the New Jersey Supreme Court, it follows that the state of New Jersey would allow death benefits to be paid to homosexual partners, and that it would also allow homosexuals to marry. Despite the "compelling interest in eradicating discrimination" used to justify infringement of the Boy Scouts' constitutional rights, the State of New Jersey has continued to implement its own discriminatory policies against homosexuals. It follows that the *Dale* Courts overlooked such policies and could most likely be forced to withdraw its statement that there is such an overarching interest in eradicating all such discrimination if faced with similar issues in the future.

Rutgers Council of AAUP Chapters v. State University of Rutgers[140] evinces the problems inherent in *Dale*'s reasoning. In *Rutgers*, the plaintiffs, as employees of the state, sought health insurance coverage under state employment benefit packages for same sex domestic partners. The very same appellate court that decided *Dale* held that the state was justified in denying the benefits under an express exception to the Law Against Discrimination.[141] First, the court addressed the argument that Law Against Discrimination was applicable to the plaintiff's claims and noted that it did not apply because there was an exception in the statute for state benefit plans.[142] The express exception on the face of the statute turns the "compelling interest" analysis of *Dale* inside out, and calls into question that bold statement by the New Jersey Supreme Court that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society."[143]

Dale held that the state has a compelling interest in eradicating discrimination on the basis of sexual orientation.[144] If this is actually

140. 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997).
141. *See Rutgers*, 689 A.2d at 838.
142. *See id.* at 832.
143. Dale v. Boy Scouts of America, 734 A.2d at 1196, 1227 (N.J. 1999), *petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).
144. *Id.*

the case, how could the legislature justify placing an exception in the public accommodations law expressly allowing the state to discriminate on a basis which has been foreclosed to everyone else. It certainly seems that if the state has a compelling interest, it would lead by example, as the United States Government did in *Bob Jones* by issuing proclamations from each branch of government, rather than implementing discriminatory policies of its own. The *Rutgers* Court justified upholding the exception against an equal protection challenge by stating that "[w]e have not created suspect classifications where the federal courts have refused to do so, and therefore, *[we] have no reason to view sexual orientation . . . as deserving of heightened scrutiny*."[145] The court then examined the exception under rational basis review since no suspect class was involved, and upheld the exception's validity.

The *Rutgers* Court also discussed the New Jersey marriage statutes during its discussion of the equal protection claims. *Rutgers* noted that the statutes consistently spoke of parties to the marriage as the "man" or the "woman," and that the New Jersey Courts had made clear that marriage was defined as the union of one man and one woman.[146] The Court recognized:

> [I]t is not disputed—as the fundamental premise. . . that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal. In the matrimonial field the heterosexual union is usually regarded as the only one entitled to legal recognition and public sanction. There is not the slightest doubt that New Jersey follows the overwhelming authority. The historic assumption in the application of common law and statutory strictures relating to marriages is that only persons who can become "man and wife" have the capacity to enter marriage. "The pertinent statutes relating to marriages . . . do not contain any explicit references to a requirement that marriage must be between a man and a woman. Nevertheless that statutory condition must be extrapolated. It is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed.[147]

Despite such a discussion not being necessary, the *Rutgers* Court seized the opportunity to set the record straight. Yet, just days later in *Dale*, the very same appellate court stated that there was a compelling interest in eradicating discrimination against homosexuals, and the New Jersey Supreme Court ultimately agreed. The only way to reconcile *Rutgers* with *Dale* is to say that in New Jersey, discrimination will not be tolerated against homosexuals because the state has a compelling interest in eradicating such discrimination, unless the

145. Rutgers Council of AAUP Chapters v. State Univ. of Rutgers, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997) (emphasis added).

146. *See id.* at 834.

147. *Id.* at 834-35 (citations omitted) (quoting M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

state itself opts to discriminate on the basis of sexual orientation. However, if the state is allowed to discriminate against homosexuals, has the compelling interest delineated and relied upon in *Dale* not evaporated?

How can the state possibly maintain that it has an interest compelling enough to override the constitutional rights of the Boy Scouts when the state itself discriminates on those same grounds upon which the Boy Scouts seeks to exclude members? The only plausible answer is that the *Dale* Courts committed clear error in finding a compelling interest. Discrimination by the state is arguably even worse than that sought by the Boy Scouts. The state denies employment benefits to homosexuals, but maintains that homosexuals should be allowed to serve as leaders in the Boy Scouts because homosexuals have been subject to a great deal of past and present discrimination. More importantly, New Jersey has made it abundantly clear that it would deny to homosexuals the *fundamental* right to marry,[148] yet maintains that when the Boy Scouts seek to exercise fundamental constitutional rights, there is a compelling interest justifying governmental interference. The state should not be allowed to speak out of both sides of its mouth, as it has sought to force the Boy Scouts to do, and *Dale* should be overruled on the grounds that there was no compelling interest in "eradicating discrimination." The effect is that New Jersey appears to be telling its citizens to "do as I say, not as I do."

Of all the problems with the *Dale* Courts' analyses, the most fatal appears upon reexamination of *Hurley* and *Roberts*. First of all, the balancing test enunciated by Justice Brennan in *Roberts* cannot be satisfied when applied to the competing interests in *Dale*. Furthermore, in addition to *Roberts*, the Supreme Court was given the opportunity in *Hurley* to enunciate the compelling interest employed by the *Dale* Courts. However, not only did the Court not do so, it did not even address the arguments urged upon it by the Gay-Lesbian Group of Boston that there was a *substantial* governmental interest in compelling the parade to accept the homosexual group.[149] Logically, if the Supreme Court thought there could be a compelling interest in eradicating discrimination against homosexuals, it would have at least addressed the "substantial interest" argument urged upon it in *Hurley*. However, the Court did not even address the issue and stated that even if it were to analyze the statute as if it were not compelling the veterans' group to change it message, the gay group would still lose. In other words, the Supreme Court has all but explicitly stated that there is no compelling interest that could justify forcing the Boy Scouts to accept Dale's application for leadership because there is not

148. *See supra* notes 146-47 and accompanying text.

149. *See* Brief of Respondent at 22, Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995) (No. 94-749).

even a substantial interest which could be found to force the Court to address the issue in *Hurley*.

Dale relied upon *Roberts* for its justification of the infringement of First Amendment freedoms.[150] The problem with such a reliance is that *Roberts*'s balancing test, when applied to *Dale*, strikes the balance clearly in favor of the Boy Scouts' rights of expressive association. In *Roberts*, it was not contended that the public accommodation law was applied for the purpose of hampering the Jaycees' ability to express its views.[151] However, this is the contention of the Boy Scouts in *Dale*, and that contention must be seriously considered while evaluating the infringement of the Boy Scouts' right of expressive association. If seriously considered, the scales are tipped in favor of the Boy Scouts.[152]

Justice Brennan noted in *Roberts* that there were many members of the business community that were members of the Jaycees and that membership in the organization would be beneficial to women because they could form many business contacts essential to succeeding in the business community while simultaneously removing barriers to economic advancement.[153] Brennan balanced those interests propounded by Minnesota against the Jaycees' right to exclude women because it *might* force them to take different positions on public issues. Justice Brennan then concluded that since there was no evidence the Jaycees *would be forced* to alter their message, and since the Jaycees' argument was based on assumption and speculation, that the state's interest outweighed the assumed interest of the Jaycees.[154]

The very same balancing test indicates that the Boy Scouts are protected from application of the New Jersey Law Against Discrimination. The interest of the state in compelling membership to the Boy Scouts does not carry with it the ability to make contacts and remove disadvantages as in *Roberts*. Such an argument may have been more persuasive, although not persuasive enough, if the argument were urged by an actual scout.[155] However, in *Dale*, such an argument is being urged upon the courts by an applicant for adult membership which would allow him to be a volunteer leader, which basically amounts to a claim that his "right to volunteer" trumps the organization's constitutional rights. Since the interest of the state is significantly lower in *Dale* than the interests articulated in *Roberts*, the interest is not compelling and should not survive application of the

150. Dale v. Boy Scouts of America, 706 A.2d 270, 285-87 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *and petition for cert. filed*, 68 U.S.L.W. 3292 (U.S. Oct. 25, 1999) (No. 99-699).

151. *See* Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

152. *See supra* notes 11-37 and accompanying text.

153. *See Roberts*, 468 U.S. at 626.

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

155. *See* Curran v. Mount Diablo Council, 952 P.2d 218 (Cal. 1998).

balancing test because the Boy Scouts' interest in excluding Dale is certainly higher than the interest of the Jaycees in excluding women. The speculation alluded to by Brennan in *Roberts* has vanished and is not present in *Dale*.

The Boy Scouts has contended that by admitting Dale as a leader that they will actually be forced to alter their message to the public as well as to the scouts enrolled in their programs. These facts makes the Boy Scout's interest more "weighty" in the balancing test than the Jaycees' interest. Unlike the Jaycees, the Boy Scouts are not basing their asserted interests on speculation and assumptions, but rather have produced evidence that the symbolic message that they now approve of the homosexual lifestyle runs directly contrary to the views that the Boy Scouts have heretofore expounded to the public and to enrolled scouts. Therefore, use of the *Roberts* balancing test makes clear that *Dale* unconstitutionally applied the New Jersey public accommodation law against the Boy Scouts.

Having determined that the scales are tipped in favor of the Boy Scouts in *Dale*, there is yet one more indication that the Supreme Court may likely overturn *Dale* if given the opportunity. Turning once again to *Hurley*, it is clear that the Supreme Court has all but expressly indicated that eradicating discrimination against homosexuals will not justify infringing constitutional rights of expressive association. As indicated previously, the Supreme Court has not as of yet granted homosexuals the privilege of being a suspect class,[156] and therefore discrimination against them will probably not give rise to a compelling governmental interest that might justify overriding an individual's First Amendment freedoms. Unless homosexuals have suddenly became a suspect class, the interests of the Boy Scouts are going to clearly outweigh the heretofore unarticulated interest of "eradicating discrimination based on sexual orientation."

In *Hurley*, the Respondents urged the Supreme Court to accept the argument that Massachusetts's anti-discrimination law served substantial governmental interests unrelated to the suppression of expression.[157] The Court did not adopt, nor even address, the Respondent's proposed test, but rather took the approach that there was *no legitimate interest* in "support of applying the Massachusetts statute . . . to expressive activity like the parade."[158] The Court clarified its decision by noting that

> The statute . . . is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accom-

156. *See supra* notes 128-39 and accompanying text.

157. *See* Brief of Respondent at 22, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

158. *Hurley*, 515 U.S. at 578.

> modations on proscribed grounds, including sexual orientation.... When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But, in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker autonomy forbids.... *While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promotion of an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.*[159]

The application of the New Jersey statute to the Boy Scouts, as in *Dale*, runs directly contrary to the above language in Justice Souter's opinion for the *unanimous* Court in *Hurley*. Compelling the Boy Scouts to admit Mr. Dale as a member compels the Boy Scouts to alter their symbolic message on the grounds that the government approves more of the message that homosexuality is an accepted lifestyle than it does of the message that people should look upon such a lifestyle with disfavor. It can be inferred from the *unanimous* decision in *Hurley* that every member of the Supreme Court would also look with the same disfavor upon New Jersey's application of the statute in *Dale*.

The Court's cautionary language in *Hurley* is also indicative of the dangers inherent in the "overapplication" of these public accommodations statutes. While one cannot take issue with the lofty motives behind the enactment of these statutes, when they are as vigorously applied as in *Dale*, they could actually cause more harm than they will prevent. Such dangers are even more apparent when one notes some of the readily apparent ramifications of *Dale*, just a few short months after being handed down. For instance, one Rhode Island chapter of the Boy Scouts has had problems with scouts challenging legal action because of discrimination based on sexual orientation, and has opted to issue a "don't ask, don't tell" policy.[160] Some commentators have taken this to mean that "the Boy Scouts are in retreat."[161] Perhaps that is exactly what organizations such as Boy Scouts should do, retreat.

The implications of overapplying these public accommodation statutes could quickly be seen should the Boy Scouts decide not to compromise their constitutional rights so easily. Perhaps the National Headquarters of the Boy Scouts should not issue a "don't ask, don't tell" policy as their Rhode Island subdivision has done, but perhaps it should withdraw from the state of New Jersey altogether. Perhaps it should withdraw from all states that seek to subject them to these statutes in a manner inapposite the approach taken by other jurisdictions which hold such statutes inapplicable to groups such as the Boy

159. *Id.* at 579 (emphasis added).
160. Michael Mello, *R.I. Boy Scouts Issue Gay Policy*, AP ONLINE, August 11, 1999, *available in* 1999 WL 22032940.
161. *Id.*

Scouts. Such an approach would limit the application of such statutes to the manner most likely intended upon enactment: to limit the application to preclude discrimination in *places* of public accommodation.[162] As indicated earlier, some states, including New Jersey, engraft certain exceptions right on the face of these statutes. Perhaps states should add similar exceptions that apply to groups such as the Boy Scouts. In the event that the Boy Scouts would rather pull out of New Jersey instead of compromising their rights, such an exception to the Law Against Discrimination may be closer than some people would like to think.

The point to be made is that not many people want their children to grow up in a society where joining a group such as the Boy Scouts is not an option. Should society seek to rid itself of wrongs such as discrimination by bending constitutional rights as was done in *Dale*, such a situation may soon appear. However contemptible some people might find a policy excluding certain groups from membership in an organization, the bottom line is that to force the organization to accept members they would rather exclude directly contravenes that organization's constitutional rights, except in limited circumstances.[163] One can only hope that after *Dale*, these statutes are carefully drafted and applied so as not to rid our society of commendable organizations such as the Boy Scouts.

IV. CONCLUSION

Public accommodation statutes give rise to serious questions of constitutionality when applied in cases such as *Dale*. Groups such as the Boy Scouts have constitutionally protected rights of expressive association, as well as free speech, that may in fact give those groups a constitutionally protected right to discriminate. However, the state may overcome such a right by delineating a compelling interest. The problem with *Dale*, and other cases that will inevitably arise when dealing with provisions in public accommodation statutes protecting homosexuals from discrimination, is that the state cannot delineate an interest that rises to the level of compelling in order to override the First Amendment freedoms at issue. The fact is that homosexuals have not been given the protections that come with designation as a suspect class, and until the Supreme Court takes that step such statutes will not be able to survive strict scrutiny. Furthermore, such a strict application of these anti-discrimination statutes risks running

162. *See generally* Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993); United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. 1981); United States Jaycees v. Iowa Civil Rights Comm'n, 427 N.W.2d 450 (Iowa 1988); United States Jaycees v. Massachusetts Comm'n Against Discrimination, 463 N.E.2d 1151 (Mass. 1984).

163. *See supra* note 78.

organizations such as the Boy Scouts right out of town. In other words, if states like New Jersey continue to tread on the Constitution to get their foot in the clubhouse door, the Supreme Court may be forced to resolve the question. If the Supreme Court ultimately takes a case such as *Dale*, the state courts may find the door being slammed on its foot in an effort to set the record straight and delineate just what the state can and cannot do. The most appropriate course of action for courts confronted with these types of questions are best tested and resolved within the private marketplace of ideas.[164] As the Boy Scouts have done, courts should "respect the idea of gay men and lesbians not to have traditional morality imposed upon them. By the same token, . . . a contrary morality [should] not be forced upon private organizations like Boy Scouts, at the expense of First Amendment freedom of speech and association."[165]

164. *See supra* note 78 and accompanying text.
165. Petition for Certiorari at 28-29, Dale v. Boy Scouts of America (U.S. Oct. 25, 1999) (No. 99-699).