

A Merit Badge for Homophobia? The Boy Scouts Earn the Right to Exclude Gays in *Boy Scouts of America v. Dale*

Jeremy Patrick*

I.	INTRODUCTION	94
II.	BACKGROUND	96
	A. <i>General Background: Setting the Stage</i>	96
	1. Freedom of Association	96
	2. Public Accommodations Laws	97
	3. Right to Exclude Cases	97
	a. Roberts v. United States Jaycees.....	98
	b. Board of Directors of Rotary International v. Rotary Club of Duarte	100
	c. New York State Club Ass’n v. City of New York	101
	d. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston	101
	B. <i>The Dale Decision: A Hard Choice Between Freedom and Equality</i>	102
	1. The Boy Scouts of America.....	103
	2. Factual History of Dale	104
	3. New Jersey Trial Court	105
	4. New Jersey Appellate Court	105
	5. New Jersey Supreme Court	106
	6. U.S. Supreme Court Majority Opinion	107
	7. Justice Stevens’ Dissent	109
	8. Justice Souter’s Dissent.....	111
III.	ANALYSIS.....	111
	A. <i>Effect of Dale on Future Litigation</i>	111
	B. <i>A Backwards Step: The Dale Majority Opinion</i>	112
	1. Is the Organization Engaged in Expressive Association?	112
	2. Would the Organization’s Expression Be Seriously Burdened by the Member’s Inclusion?.....	116

* J.D. Candidate, University of Nebraska College of Law, 2001. The author wishes to thank Daniel Justice for his love, support, and patience during the hectic time this was written.

3. Does the State's Compelling Interest in Ending Discrimination Outweigh the Burden Imposed on the Organization?	118
IV. CONCLUSION	119

I. INTRODUCTION

The issue of whether gay, lesbian, bisexual, and transgendered (GLBT) individuals should receive equal rights is a contentious one in modern political discourse. The contest is waged in the social sphere (such as protests by ACT-UP and the Reverend Fred Phelps), the executive branch of government (President Clinton's 1998 executive order banning employment discrimination by federal agencies), and the legislative branch (including the 1996 Defense of Marriage Act). However, in the past fifteen years, GLBT activists have increasingly turned to the judicial branches of state and federal government in an attempt to secure equal rights. The results of these attempts have been mixed. In 1987, GLBT activists suffered a demoralizing defeat when the Supreme Court held that sodomy statutes were constitutional.¹ In recent years, the trend had seemed to turn with the Court's voiding of Colorado's Amendment 2 in 1996² and the Vermont Supreme Court's holding in 1999 that same-sex couples must be afforded the same rights as opposite sex couples.³

In *Boy Scouts of America v. Dale*, the United States Supreme Court issued its most recent decision in the area of GLBT rights.⁴ In *Dale*, the Boy Scouts of America (BSA) expelled a decorated Scout, James Dale, from his position as a volunteer Scoutmaster after he revealed his homosexuality in a newspaper interview.⁵ When Dale brought suit under a New Jersey public accommodations law, the New Jersey Supreme Court held that the BSA had to admit Dale.⁶ The court reasoned that the BSA was a public accommodation under the meaning of the statute because of its solicitation activities and close relationship with government entities,⁷ that it did not have a freedom of intimate

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

2. See *Romer v. Evans*, 517 U.S. 620 (1996).

3. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

4. 120 S. Ct. 2446 (2000).

5. Kinga Bolondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, § 2, at 11.

6. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

7. See *id.* at 1213.

association because of its large size and nonselectivity,⁸ and that it did not have a freedom of expressive association because Scouts did not assemble for the purpose of disseminating the belief that homosexuality was immoral.⁹

However, the United States Supreme Court reversed and held that the BSA could not be forced to admit Dale.¹⁰ The Court held that the BSA's right to expressive association would be infringed because the BSA had a sincere belief that homosexuality was immoral¹¹ and Dale's mere presence would force it to send the message that homosexuality was consistent with Scouting values.¹² This decision is likely to have an important impact on the effectiveness of public accommodations laws because it will be easier for organizations to argue that they have an expressive purpose in their discrimination which would be violated by the mere presence of the excluded individual.

This Note examines the *Dale* decision. Part II contains brief discussions of public accommodations laws and the freedom of association. Next, the Supreme Court doctrine on so-called "right-to-exclude" cases is examined. Part II concludes with an in-depth look at the majority and dissenting opinions of the United States Supreme Court in *Dale*. Part III analyzes the Court's majority opinion and argues that it was erroneously decided for the following three reasons. First, the BSA did not have an expressed belief that homosexuality was immoral since no public documents contained this belief and members were taught to discuss sexuality with their parents or religious leaders instead of Scoutmasters. Second, any expressive purpose the BSA had regarding homosexuality would not be seriously burdened by Dale's presence because he had agreed to follow official BSA policy (that Scoutmasters not discuss sexuality with Scouts) and because the BSA could easily mitigate any message Dale's presence would send (e.g., by including explicit declarations in BSA publications that homosexuality was inconsistent with Scouting but that the BSA followed all applicable laws). Third, any incidental burden on the BSA's freedom of expressive association would be justified by the State of New Jersey's compelling interest in ending discrimination on the basis of sexual orientation. As will be shown, this case will have important impacts on state efforts to end discrimination in places of public accommodations.

8. *See id.* at 1221.

9. *See id.* at 1223.

10. *See* 120 S. Ct. 2446, 2458 (2000).

11. *See id.* at 2453.

12. *See id.*

II. BACKGROUND

A. *General Background: Setting the Stage*

Like every case, the *Dale* decision did not spring fully formed from a void. A complex factual and legal history set the stage for it, and understanding this history is essential to understanding the reasoning of its majority and dissenting opinions. This section briefly examines the origin of the freedom of association and of public accommodation laws before turning to a discussion of several important cases that gave meaning to a “right to associate” in the context of organizations’ attempts to exclude certain individuals protected under public accommodations laws. The precedential value of these cases was one of the major points of dispute between the majority and dissenting opinions in *Dale*.

1. Freedom of Association

The United States Constitution does not explicitly provide for a right to associate. In the latter half of the twentieth century, however, the Supreme Court inferred the existence of such a right from the First Amendment rights of free speech, press, assembly, and petition.¹³ In *NAACP v. Alabama ex rel. Patterson*,¹⁴ traditionally seen as the first judicial recognition of a freedom of association, the State of Alabama tried to force a black civil rights organization to reveal the names and addresses of its rank-and-file members.¹⁵ The Supreme Court held that the organization had a constitutional right to refuse disclosure because of its members’ freedom of association.¹⁶ The Court stated “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment.”¹⁷ The Supreme Court later elaborated on this holding by stating that freedom of association consisted of two distinct rights: the right to intimate association and the right to expressive association.¹⁸

13. See Robert N. Johnson, Note, Board of Directors of Rotary International v. Rotary Club of Duarte: *Redefining Associational Rights*, *BYU L. REV.* 141, 142 (1988).

14. 357 U.S. 449 (1958).

15. See *id.* at 451.

16. See *id.* at 466.

17. *Id.* at 460.

18. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

2. Public Accommodations Laws

The purpose of public accommodations laws is to ensure equal access to goods and services¹⁹ and to “affirm . . . the equal dignity and worth of excluded individuals.”²⁰ The first federal public accommodations statute was ruled unconstitutional by the Supreme Court in 1883, but states quickly stepped in to enact similar laws.²¹ In 1964, Congress passed the Civil Rights Act which prohibited discrimination in public accommodations on the basis of race, color, religion, or national origin.²² Efforts to end discrimination continue to be greater under state law than federal law, including protection based on characteristics such as age, marital status, sexual orientation, and more.²³ The Supreme Court has held that public accommodations laws “plainly serve[] compelling state interests of the highest order.”²⁴ As one commentator explained, “[b]y refusing to deal with an individual because of the individual’s status, a group fails to recognize the person’s individuality and humanity and thereby diminishes us all.”²⁵

3. Right to Exclude Cases

The Supreme Court has noted that “[f]reedom of association . . . plainly presupposed a freedom not to associate.”²⁶ However, this freedom is not absolute and beginning in the mid-1980s the Court was faced with a series of cases dealing with the issue of whether organizations have a constitutional right to exclude members of protected classes under state public accommodations laws. The first of these cases, *Roberts v. United States Jaycees*, is discussed at length because, not only was it a landmark case in the struggle to end sex discrimination, it was

19. See Cara J. Frey, Comment, *Hate Exposed to the Light of Day: Determining the Boy Scouts of America’s Expressive Purpose Solely from Objective Evidence*, 75 WASH. L. REV. 577, 580 (2000).

20. Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations*, 104 HARV. L. REV. 1835, 1851 (1991). See also *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights & Opportunities*, 528 A.2d 352, 359 (Conn. 1987) (“The purpose of antidiscrimination legislation is to afford access to opportunity on the basis of individual abilities rather than on the basis of stereotypical generalizations.”).

21. See Marissa L. Goodman, Note, *A Scout Is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 828-29 (1999).

22. See *id.* at 829.

23. See *id.*

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

25. Lisa A. Hammond, Note, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L.J. 1385, 1398 (1992).

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

the first time the Court set forth a framework to analyze all subsequent freedom of association cases.²⁷ The next three cases are discussed briefly to give a sense of the development of the law in this area.

a. *Roberts v. United States Jaycees*²⁸

In *Roberts*, the Supreme Court was confronted with the novel issue of whether an all-male organization's freedom of association is violated when a public accommodations law forces it to accept women as members. The Jaycees, an all-male nonprofit organization devoted to humanitarian and professional activities²⁹ had established a membership classification system that created two main categories—"regular" and "associate" members.³⁰ "Regular" membership was open to men between the ages of eighteen and thirty-five,³¹ while "associate" membership was open to women or older men.³² "Associate" members could not vote, hold office, or participate in certain training and award programs.³³ When two Minnesota chapters began allowing women as "regular" members, the national organization imposed a number of sanctions and eventually threatened to revoke the chapters' charters.³⁴

Members of the chapters filed complaints under Minnesota's Human Rights Act which forbade, *inter alia*, discrimination on the basis of sex in places of public accommodation.³⁵ The Jaycees argued that its freedom of association would be violated by the forced admission of women.³⁶ Eventually the dispute reached the Supreme Court, and the Court held that application of the statute did not violate the Jaycees' constitutional rights.³⁷ It explained that freedom of association has two senses: a right to intimate association and a right to expressive association.³⁸ The Court stated that the right to intimate association protects the individual's choice to "enter into and maintain certain intimate human relationships,"³⁹ and that these relationships "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and

27. *Id.* at 609.

28. *Id.*

29. *See id.* at 612-13.

30. *See id.* at 613.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* at 614.

35. MINN. STAT. § 363.03(3) (1982).

36. *See Roberts*, 468 U.S. at 617.

37. *See id.* at 609, 631.

38. *See id.* at 617.

39. *Id.*

seclusion from others in critical aspects of the relationship.”⁴⁰ The Court held that the Jaycees did not have a right to intimate association because the chapters had hundreds of members,⁴¹ did not have criteria for judging applicants for membership (other than age or sex),⁴² and admitted new members without inquiry into their background.⁴³

The Court explained that the right to expressive association is tied to the individual’s First Amendment rights to engage in certain activities: “An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort towards those ends were not also guaranteed.”⁴⁴ The Court noted, however, that this right could be limited by government action that served an important purpose: “The right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁴⁵

The Court found that the Jaycee’s right to expressive association would not be seriously burdened because the type of activities the organization participated in (charity, lobbying, and fundraising) did not depend on the sex of the person performing them.⁴⁶ The Court also noted that even if the forced inclusion of women did incidentally burden the Jaycee’s freedom of expressive association, the effect was necessary to accomplish the State’s legitimate purpose in ending sex discrimination.⁴⁷ “[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”⁴⁸

In effect, the legacy of *Roberts* is a deceptively simple three-step test to determine if a group has a constitutional right to exclude members in the face of a public accommodations law. First, the court must determine if the group is engaged in expressive association.⁴⁹ Second, if the group is engaged in expressive association, the court must decide if

40. *Id.* at 620.

41. *See id.* at 621.

42. *See id.*

43. *See id.*

44. *Id.* at 622.

45. *Id.* at 623.

46. *See id.* at 627.

47. *See id.* at 628.

48. *Id.*

49. *See id.* at 626.

forced inclusion of the member would “serious[ly] burden” this right.⁵⁰ Third, if the group is engaged in expressive association that would be burdened by inclusion of the new member, the court must decide if the State has a compelling interest that outweighs the burden imposed on the organization.⁵¹

b. Board of Directors of Rotary International v. Rotary Club of Duarte⁵²

Three years after deciding *Roberts*, the Supreme Court was faced with a similar issue in *Rotary*. Rotary International (R.I.), an “organization of business and professional men united worldwide [to] provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world,”⁵³ had revoked the charter of its chapter in Duarte, California because the chapter had admitted women members in violation of Rotary’s constitution.⁵⁴ The chapter and its female members filed suit under California’s Unruh Civil Rights Act,⁵⁵ which forbade, inter alia, discrimination on the basis of sex “in all business establishments of every kind whatsoever.”⁵⁶ When faced with the issue, the Supreme Court first entrenched the fact that “*Roberts* provides the framework for analyzing [freedom of association] constitutional claims.”⁵⁷ The Court dismissed Rotary’s claim of freedom of intimate association by noting that its individual clubs numbered from fewer than twenty to more than 900 members,⁵⁸ had an inclusive membership policy,⁵⁹ and carried on many activities in the presence of strangers.⁶⁰

The Court quickly disposed of Rotary’s freedom of expressive association claim by stating that “the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”⁶¹ The Court noted that Rotary’s ability to perform humanitarian activities would probably be strengthened, not weakened, by including women.⁶²

50. *See id.*

51. *See id.* at 628.

52. 481 U.S. 537 (1987). *See generally* Johnson, *supra* note 13, at 147-52.

53. Bd. of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537, 539 (1987).

54. *See id.* at 541.

55. CAL. CIV. CODE § 51 (West 1982).

56. *Id.*

57. *Rotary*, 481 U.S. at 544.

58. *See id.* at 546.

59. *See id.*

60. *See id.* at 547.

61. *Id.* at 548.

62. *See id.* at 549.

The Court concluded, as in *Roberts*, by noting that even if some slight infringement on Rotary's freedom of association was made, the intrusion was justified by the State's compelling interest in preventing sex discrimination.⁶³

c. New York State Club Ass'n v. City of New York⁶⁴

A year after *Rotary Club*, the Supreme Court was presented with a facial challenge to a public accommodations law. New York City had revised its Human Rights Law to cover any private club of more than four hundred members that provided regular meal services and received dues from members.⁶⁵ The law was designed to afford minority groups access to the important business and professional contacts that occur at such clubs.⁶⁶ However, an association of 125 clubs filed suit, alleging that the statute violated its members' freedom of association.⁶⁷

The Supreme Court unanimously held that the statute was constitutional.⁶⁸ The Court stated that the association had not shown that the law "could never be applied in a valid manner"⁶⁹ because presumably at least some of the clubs could be constitutionally subject to the law.⁷⁰ The Court noted, however, that individual clubs would still have the right to challenge a particular application of the law.⁷¹

d. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*⁷²

Hurley was the only important right-to-exclude case handled by the Supreme Court in the 1990s. In *Hurley*, a group named GLIB was denied permission by the organizers of Boston's St. Patrick's Day parade to march as a group and carry a banner.⁷³ GLIB was "formed for the very purpose of marching in [the parade] in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the

63. *See id.*

64. 487 U.S. 1 (1988).

65. *See id.*

66. *See* New York State Club Ass'n v. City of New York, 487 U.S. 1, 6 (1988).

67. *See id.* at 8.

68. *See id.* at 18, 20.

69. *Id.* at 11.

70. *See id.* at 12.

71. *See id.* at 15.

72. 515 U.S. 557 (1995). *See generally* Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998).

73. *See* *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 561 (1995).

community, and to support the like men and women who sought to march in the New York parade.”⁷⁴ The group brought suit under a Massachusetts law that prohibited discrimination on the basis of sexual orientation in places of public accommodation.⁷⁵ The group was granted entry by a trial court because the parade had no “specific expressive purpose entitling [it] to protection under the First Amendment.”⁷⁶ In a unanimous opinion, the Supreme Court reversed,⁷⁷ holding that an expressive message need not be “narrow [and] succinctly articulable”⁷⁸ to be protected by the First Amendment, and that forcing the parade organizers to allow GLIB to march would force it to send a message it did not agree with.⁷⁹

Two important aspects of this case must be understood to place it in proper context. First, the parade organizers brought suit under a freedom of speech theory, not a freedom of association theory.⁸⁰ Second, the organizers sought only to exclude GLIB from marching as a group, not to prohibit GLBT individuals from marching as part of other parade units: “[The parade organizers] disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the [parade organizers had] approved to march.”⁸¹

B. *The Dale Decision: A Hard Choice Between Freedom and Equality*

The application of public accommodations statutes to organizations like the Boy Scouts is a contentious and intriguing issue because it involves a conflict between two of our nation’s most cherished values: the right of an individual to be treated on his or her own merits instead of on irrational stereotypes and the right of individuals to associate with whomever they wish without the government second-guessing their choice. This section first examines the history and structure of the Boy Scouts. Next, the facts leading up to the *Dale* litigation are examined before a brief summary of the New Jersey trial, Appellate Division, and

74. *Id.* at 570.

75. MASS. GEN. LAWS § 272:98 (1992).

76. *Hurley*, 515 U.S. at 563.

77. *See id.* at 581.

78. *Id.* at 569.

79. *See id.* at 575.

80. *See id.* at 567. In dicta, the Court did say that “[i]f we were to analyze this case along [freedom of association] lines, GLIB would lose.” *Id.* at 580. However, the Court did not analyze this case under the *Roberts* framework and it remains unclear how much precedential value this statement holds.

81. *Id.* at 572.

Supreme Court decisions are presented. This section concludes with a discussion of the United States Supreme Court's majority and dissenting opinions.

1. The Boy Scouts of America

As one court stated, “[v]irtually everyone knows something of the scouts. The image of youths pursuing outdoor and patriotic activities is entrenched in our culture.”⁸² The BSA was chartered by an Act of Congress in 1915 to “promote, through organization, and cooperation . . . the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues.”⁸³ The BSA has become one of America’s most successful nonprofit organizations; over eighty-seven million youths and adults have joined Scouting since its inception⁸⁴ and the organization currently has over four million youth members and one million adult members.⁸⁵ The BSA is comprised of 123,000 small units called “troops,”⁸⁶ which are coordinated by local and regional administrative units called “councils.”⁸⁷ National BSA policy is set by a National Council and its Executive Committee.⁸⁸ Currently, the BSA operates the well-known scouting program, publishes three magazines on scouting, and offers an in-school scouting curriculum called “Learning for Life.”⁸⁹ Entry into the BSA is relatively nonselective—any boy over the age of eleven willing to recite the Oath and meet a few other simple requirements is allowed membership⁹⁰ and the BSA actively advertises for new members.⁹¹

However, the BSA has repeatedly faced lawsuits brought under public accommodations laws for its refusal to admit the so-called “Three-G’s,” gays, girls, and the “godless” (atheists and agnostics).⁹² Until James Dale brought suit in Illinois, the BSA had almost uniformly

82. *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 258 (Cal. 1998) (Werdegar, J., concurring).

83. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1202 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

84. *See id.* at 1200.

85. *See id.*

86. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

87. *See id.* at 274.

88. *See id.* at 274, 276.

89. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

90. *See id.* at 1203-04.

91. *See id.* at 1201.

92. Goodman, *supra* note 21, at 827.

succeeded in evading public accommodations laws by arguing that it was not a “public accommodation” or a “business establishment,” which was necessary for the application of most public accommodations laws.⁹³ As one commentator put it, “[a]lthough BSA has teetered within the scope of state public accommodation law, the organization has not faced liability.”⁹⁴

2. Factual History of Dale

James Dale joined the Boy Scouts when he was eight years old.⁹⁵ By all accounts an excellent scout, Dale earned several awards, thirty merit badges, selection as a delegate to the 1985 National Boy Scout Jamboree, and the coveted rank of Eagle Scout (an honor attained by only 3% of Boy Scouts).⁹⁶ At the age of eighteen, Dale was approved for adult membership in the BSA and began serving as an Assistant Scoutmaster.⁹⁷

Approximately two years later, Dale received a letter from the Monmouth Council, the BSA’s administrative unit for Dale’s Troop, informing him that it “request[s] that [he] sever any relations that [he] may have with the Boy Scouts of America.”⁹⁸ After Dale requested more information, he was told that he failed to meet “the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals.”⁹⁹ At a later deposition, the Council Executive of the Monmouth Council claimed that he learned of Dale’s homosexuality by having read an article in the Newark Star-Ledger about a seminar on the psychological health of gay and lesbian

93. See, e.g., *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987) (allowing exclusion of girls allowed because BSA did not deny them “accommodations” under state law); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (exclusion of atheists allowed because BSA not a “public accommodation” under state law); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993) (exclusion of atheists allowed because BSA not a “public accommodation” under federal law); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998) (exclusion of homosexuals allowed because BSA not a “business establishment” under state law). *But see*, *Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724 (Chi. Comm’n Hum. Rel. Feb. 21, 1996), *aff’d*, No. 96 CH 03266 (Ill. Cir. Ct. Aug. 12, 1999) (unpublished opinion), *appeal docketed*, No. 1-993018 (Ill. App. Ct. Aug. 23, 1999) (BSA could not refuse employment to a homosexual).

94. David J. Treacy, Note, 10 SETON HALL CONST. L.J. 577, 583 (2000).

95. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 275 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000).

96. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000).

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

98. *Id.*

99. *Id.*

adolescents.¹⁰⁰ In the article, Dale identified himself as gay and as copresident of a Rutgers University GLBT rights group, but the BSA was not mentioned.¹⁰¹

After attempting to gain reinstatement by internal BSA procedures,¹⁰² Dale filed suit for damages and reinstatement under New Jersey's Law Against Discrimination¹⁰³ (LAD), which prohibits, *inter alia*, discrimination on the basis of sexual orientation in "place[s] of public accommodation."¹⁰⁴

3. New Jersey Trial Court

The trial court granted summary judgment for the BSA, holding that the organization was not a "place" for the purposes of LAD¹⁰⁵ and that even if it was, the BSA qualified for exemption as a "distinctly private" organization.¹⁰⁶ The court also stated that the BSA's freedom of expressive association would be violated by forced inclusion of Dale because "[t]he presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of scouting."¹⁰⁷

4. New Jersey Appellate Court

The Appellate Division of the Superior Court of New Jersey reversed the trial court's decision.¹⁰⁸ The appellate court held that LAD applies to more than just "places" in a narrow sense, because such a reading would frustrate the purpose of the statute. As the court put it, "places do not discriminate; people who own and operate places do."¹⁰⁹

100. *See id.* *See also* Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, § 2, at 11.

101. *See* ACLU Amicus Brief at 2, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

102. *See* *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1205 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

103. N.J. STAT. ANN. § 10:5-4 (West 1993) ("All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.").

104. *Id.*

105. *See* *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 278 (N.J. Super. Ct. App. Div.), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

106. *See id.* at 283.

107. *Id.* at 277.

108. *See id.* at 293.

109. *Id.* at 279 (quoting *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1282 (7th Cir. 1993) (Cummings, J., dissenting)).

The court explained that organizations with membership open to the general public, with no restrictions, are places of public accommodation, and therefore, the BSA is such an organization because of its size, willingness to include all boys that meet the age requirement, and frequent endeavors to attract new membership.¹¹⁰

The court then held that the BSA's freedom of expressive association would not be infringed because it could not demonstrate a "strong relationship between its expressive activities and its discriminatory practice."¹¹¹ The court argued that if the BSA's avowed goals are virtues like patriotism, courage, and self-reliance, "[t]here is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to care for, or to impart BSA humanitarian ideals to the young boys in his charge."¹¹²

5. New Jersey Supreme Court

The New Jersey Supreme Court affirmed.¹¹³ It noted that New Jersey's LAD had been interpreted to apply to more than just "places" for almost twenty-five years¹¹⁴ and the legislature had never saw fit to modify this ruling; indeed, the legislature had instructed that the statute should be construed liberally to effect its purposes.¹¹⁵ The court stated that "[o]ur courts have repeatedly held that when an entity invites the public to join, attend, or participate in some way, that entity is a public accommodation within the meaning of the LAD."¹¹⁶ The court stated that the BSA was a public accommodation because of its extensive solicitation activities and close relationship with other recognized public accommodations.¹¹⁷

On the BSA's freedom of association claim, the court held that the BSA was not an intimate association due to its large size, nonselectivity, and public meetings.¹¹⁸ It found that the organization's freedom of expressive association was not infringed because "the statute does not have a significant impact on Boy Scout members' ability to associate

110. *See id.* at 280-81.

111. *Id.* at 287.

112. *Id.* at 289.

113. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

114. *See id.* at 1209 (citing *Nat'l Org. of Women v. Little League Baseball, Inc.*, 338 A.2d 198 (N.J. 1974)).

115. *See N.J. STAT. ANN.* § 10:5-3 (West 1993).

116. *Dale*, 734 A.2d at 1210.

117. *See id.* at 1211.

118. *See id.* at 1221.

with one another in pursuit of shared views,”¹¹⁹ since the BSA does not associate for the purpose of disseminating the belief that homosexuality is immoral, discourages its leaders from discussing any sexual issues, and includes members with widely-varying views on homosexuality.¹²⁰ The court also distinguished *Hurley* by stating that “Dale does not come to meetings ‘carrying a banner’ . . . [he] has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scout policies.”¹²¹

6. U.S. Supreme Court Majority Opinion

A majority of the Supreme Court¹²² held that forcing the BSA to admit Dale as a member would violate the organization’s First Amendment right to freedom of expressive association.¹²³ In an opinion by Chief Justice Rehnquist, the Court began by noting that “[f]reedom of association . . . plainly presupposes a freedom not to associate,”¹²⁴ and the forced inclusion of an unwanted member could violate this freedom if it seriously affected the group’s ability to advocate a viewpoint and was not justified by a compelling state interest that could not be achieved in a less restrictive manner.¹²⁵

Next, the Court quoted, at length, excerpts from the BSA’s Mission Statement¹²⁶ (“It is the mission of the Boy Scouts . . . to instill values in young people”), Scout Law¹²⁷ (“A Scout is . . . CLEAN”), and Oath¹²⁸ (“I will do my best . . . [t]o keep myself . . . morally straight”), and stated that “thus, the general mission of the Boy Scouts is clear: ‘to instill values in young people.’”¹²⁹ The Court stated that it “seems indisputable that an organization that seeks to transmit such a system of values

119. *Id.* at 1223.

120. *See id.*

121. *Id.* at 1229.

122. The majority was made up of Chief Justice Rehnquist and Justices Scalia, Kennedy, O’Connor, and Thomas.

123. *See* *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

124. *Id.* at 2451 (quoting *Roberts v. United States Jaycees*, 486 U.S. 609, 623 (1984)).

125. *See id.*

126. *See id.* (“It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.”).

127. *See* *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1203 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000) (“A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.”).

128. *See id.* at 1202 (“On my honor I will do my best . . . [t]o keep myself physically strong, mentally awake, and morally straight.”).

129. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

engages in expressive activity.”¹³⁰ The Court also stated that it must undertake a limited analysis of the BSA’s views on homosexuality to determine if “the forced inclusion of Dale . . . would significantly affect [its] ability to advocate public or private viewpoints.”¹³¹ Although the Scout Law and Oath “do not expressly mention sexuality or sexual orientation,”¹³² and the requirement that a Scout be “morally straight” and “clean” are “by no means self-defining,”¹³³ the Court stated the BSA’s 1978 position paper¹³⁴ (“We do not believe that homosexuality and leadership in Scouting are appropriate”), 1991 position statement¹³⁵ (“[H]omosexuals do not provide a desirable role model for Scouts”), and consistent views on homosexuality during litigation in the 1980s was sufficient proof of the BSA’s sincere belief that homosexuality was inconsistent with Scouting values¹³⁶ and that “it is not the role of the court to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”¹³⁷

After finding that the BSA had a sincere belief that homosexuality was inconsistent with its values, the Court turned to the question of whether Dale’s inclusion would burden the BSA’s desire to “not promote homosexual conduct as a legitimate form of behavior.”¹³⁸ The Court stated that it should give deference to an organization’s view of what would impair its expression and that “Dale’s presence in the Boy Scouts would . . . force the organization to send a message, both to the youth members and the world, that [the BSA] accepts homosexual conduct as a legitimate form of behavior.”¹³⁹

Although the New Jersey Supreme Court had held that the BSA “do[es] not associate for the purpose of disseminating the belief that homosexuality is immoral,”¹⁴⁰ and therefore would not be burdened by

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 2453 (“Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader? A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate.”).

135. *See id.* (“We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.”).

136. *See id.* at 2449.

137. *Id.* at 2452.

138. *Id.* at 2453 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000)).

139. *Id.*

140. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000).

Dale's inclusion, the United States Supreme Court held that associations do not have to associate for the "purpose" of advocating a certain viewpoint in order to be protected, so long as they engage in expressive conduct that could be burdened.¹⁴¹ The Court drew an analogy to *Hurley*,¹⁴² where parade organizers were allowed to exclude a GLBT contingent even though the parade had nothing to do with sexual orientation. The Court stated that the BSA's failure to actively expound the view that homosexuality was immoral does not prevent them from being constitutionally protected because "teach[ing] only by example . . . does not negate the sincerity of its belief."¹⁴³ The Court stated that it was irrelevant that members of the BSA disagree with the policy of excluding homosexuals because "[t]he Boy Scouts take an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."¹⁴⁴

Finally, the Court concluded, without elaboration, that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."¹⁴⁵

7. Justice Stevens' Dissent

In a dissenting opinion, Justice Stevens¹⁴⁶ argued that forcing the BSA to include Dale did not seriously burden any of its goals or force it to send a message that it did not wish to send.¹⁴⁷ Like the majority, Justice Stevens' dissent also quoted extensively from the Scout Oath, Law, and Mission Statement.¹⁴⁸ The dissent noted that these materials, taken together, encourage a diverse membership limited only by age and gender.¹⁴⁹ The dissent discussed the BSA's requirement that members be "morally straight" and "clean," and stated that "[i]t is plain as day that neither one of these principles . . . says the slightest thing about homosexuality."¹⁵⁰ Justice Stevens emphasized the fact that Scoutmasters are directed to refrain from discussing sexual matters with curious youths and instead are told to refer them to parents or religious

141. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2455 (2000).

142. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995).

143. *Dale*, 120 S. Ct. at 2455.

144. *Id.*

145. *Id.* at 2457.

146. Justice Stevens' dissent was joined by Justices Souter, Ginsburg, and Breyer.

147. See *id.* at 2459.

148. See *id.* at 2460-61 and *supra* notes 126-128.

149. See *id.* at 2460.

150. *Id.* at 2461.

leaders.¹⁵¹ He also attacked the majority's use of the 1978 policy statement as evidence of the BSA's position by noting that it contained a provision that the BSA would obey all antidiscrimination laws, was never distributed beyond the Executive Council, and that, in any event, "simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim."¹⁵² Because later policy statements were made after Dale's exclusion, the dissent argued that they were irrelevant.¹⁵³

Next, Justice Stevens compared the BSA's refusal to admit homosexuals to the Jaycees' and Rotary Club International's refusal to admit women and stated that there was not sufficient grounds to distinguish them because in none of the three cases was a serious burden imposed on the organization's ability to convey its message.¹⁵⁴ He stated that "[t]he evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality."¹⁵⁵ Justice Stevens was also critical of the majority's willingness to simply adopt the BSA's word for what its goals and views were.¹⁵⁶ In his view, since the BSA did not have a clear and unambiguous policy on homosexuality to begin with, forcing them to include Dale could not seriously burden their right of expressive association.¹⁵⁷

The dissent also attempted to distinguish *Hurley* by arguing that it was a case where an organization's freedom to propound a certain view was endangered; the parade organizers in that case did not exclude homosexuals per se, they merely refused to allow them to march as a separate contingent with a banner and distribute fliers.¹⁵⁸ Finally, Justice Stevens noted with distaste the prejudice and stereotypical views much of society holds about homosexuality and stated that "such prejudices are still prevalent and . . . they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect."¹⁵⁹

151. *See id.*

152. *Id.* at 2463.

153. *See id.* at 2464.

154. *See id.* at 2469-70.

155. *Id.*

156. *See id.* at 2471 ("This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further.").

157. *See id.*

158. *See id.* at 2475.

159. *Id.* at 2478.

8. Justice Souter's Dissent

Justice Souter filed a brief dissenting opinion¹⁶⁰ in which he noted that although a decline in stereotypical thinking about homosexuality was “laudable,”¹⁶¹ the desirability of a group's view could not influence its First Amendment right to freedom of association. Justice Souter argued that the BSA had not made out such a claim because of “its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message.”¹⁶²

III. ANALYSIS

Before *Dale*, the right-to-exclude cases were not controversial, at least in so far as members of the Supreme Court were concerned. There was not a single dissenting opinion in any of the four cases leading up to it (i.e., *Roberts*, *Rotary*, *New York State Club Ass'n*, and *Hurley*) and this seemed to be a sign of some stability in an otherwise politically-charged and ideologically-divided Court.

What then, to make of the 5-4 *Dale* decision? Unless the case was decided purely on politics (a distinct possibility), either the majority or the dissent erroneously construed what was apparently clear legal precedent. After examining the likely effects of the case on future litigation, this section argues that the case was wrongly decided under the *Roberts* framework.

A. Effect of *Dale* on Future Litigation

It is difficult to determine what effect the *Dale* decision will have on future right-to-exclude cases because freedom of association claims are heavily fact-intensive, requiring a thorough examination of the type of expression an organization is engaged in and whether it will be burdened by inclusion of the plaintiff. The fact that it was a 5-4 decision involving the possible forced inclusion of a member of one of this nation's most feared minority groups (homosexuals) into one of the nation's most cherished “patriotic” organizations (the BSA) will presumably limit the deference future courts give it. However, it is clear that the *Dale* majority set forth some important principles of general applicability for future right-to-exclude cases.

160. Justice Souter's dissent was joined by Justice Ginsburg and Justice Breyer.

161. *Id.* at 2479.

162. *Id.*

First, the majority made it clear that the expressive views of an organization should be determined by referring to its official policies—differing views among an organization’s membership is irrelevant.¹⁶³ Second, ambiguous policy statements should be resolved in the organization’s favor and inconsistent statements do not undermine the sincerity of its belief.¹⁶⁴ In essence, courts should take the organization’s word for it on what it believes. Finally, the majority implicitly states that the mere presence of an unwanted individual could inhibit an organization’s ability to propound a certain point of view.¹⁶⁵ Arguably, application of these principles will make it easier for an organization to succeed on a freedom of association claim.

B. A Backwards Step: The Dale Majority Opinion

This Note does not focus on policy arguments or the political desirability of legal protection for GLBT individuals because the New Jersey Supreme Court’s opinion in *Dale* received extensive discussion in the secondary literature.¹⁶⁶ Instead, this section contains an argument that the majority opinion in *Dale* is inconsistent with prior case precedent and, if carried to its logical extreme, would result in the evisceration of current public accommodations laws. This section is divided into three parts, one for each of the steps in the *Roberts* test.¹⁶⁷

1. Is the Organization Engaged in Expressive Association?¹⁶⁸

As the dissenting opinion pointed out,¹⁶⁹ one of the most glaring errors in the majority’s opinion was their willingness to simply take the BSA’s word for the fact that it was engaged in expressive association on the subject of homosexuality. Relying solely on policy statements by the

163. See *id.* at 2454.

164. See *id.* at 2452.

165. See *id.* at 2454.

166. A lengthy, but by no means complete, list includes Shannon L. Doering, *Treading on the Constitution to Get a Foot in the Clubhouse Door*, 78 NEB. L. REV. 644 (1999); Rachel A. Van Cleave, *Advancing Tolerance and Equality Using State Constitutions: Are the Boy Scouts Prepared?*, 29 STETSON L. REV. 237 (1999); Karen L. Dayton, Note, *Dale v. Boy Scouts of America: New Jersey’s Law Against Discrimination Weighs the Balance Between the First Amendment and the State’s Compelling Interest in Eradicating Discrimination*, 16 GA. ST. U. L. REV. 387 (1999); Frey, *supra* note 19; Goodman, *supra* note 21; David J. Treacy, Note, 10 SETON HALL CONST. L.J. 577 (2000); Stephen P. Warren, Note, *Of Merit Badges and Sexual Orientation: The New Jersey Supreme Court Balances the Law Against Discrimination and the Freedom of Association in Dale v. Boy Scouts of America*, 30 SETON HALL L. REV. 951 (2000).

167. See *supra* Part II.A.

168. The argument in this section is somewhat similar to that made by Cara J. Frey in Frey, *supra* note 19.

169. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. at 2466.

BSA's Executive Council, the majority stated that "[t]he Boy Scouts take an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."¹⁷⁰ The Court relied primarily on the BSA's assertion that homosexual Scouts was prohibited by the requirements in the Scout Handbook that Scouts be "morally straight" and "clean."¹⁷¹

The problem with the Court's position is that it gives too much deference to an organization's litigation stance and does not comport with prior precedents. In *Roberts*, the Jaycees had a long-standing policy against allowing women members because members believed they could not accomplish their goals in a gender-mixed environment.¹⁷² Similarly, Rotary Club International had a long-standing policy against female members and believed it could not conduct activities in foreign countries if forced to include them.¹⁷³ However, the Court in those two cases looked beyond the mere fact that an organization had a policy and asked whether there was a "logical nexus between the group's discriminatory membership policies and the group's purpose or message."¹⁷⁴

In reality, the BSA simply has no purpose or goal at all regarding homosexuality. Members associate for the purpose of learning woodcraft, good sportsmanship, and similar virtues and skills. As one commentator said, "assistant scoutmasters teach boys how to tie knots, not that homosexuality is immoral."¹⁷⁵ As the majority noted, Scouts do not have to assemble for the *purpose* of disseminating the belief that homosexuality is immoral, but to gain First Amendment protection under the freedom of expressive association the BSA has to at least transmit this message in one form or another.¹⁷⁶

In *Richardson v. Chicago Area Council of the Boy Scouts of America*, a homosexual job applicant brought a discrimination suit against the BSA under Chicago's public accommodations law.¹⁷⁷ The trial judge, after examining "literally thousands of pages of Scouting literature" and listening to "intelligent, articulate, and sincere witnesses presented by both sides of this controversy" concluded that "ideas about the morality or immorality of one's sexual orientation are absent from the

170. *Id.* at 2454.

171. *See id.* at 2452.

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

173. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 541 (1987).

174. Note, *supra* note 20, at 1843.

175. Warren, *supra* note 167, at 951, 984.

176. *See Boy Scouts of Am. v. Dale*, 120 S. Ct. at 2454.

177. No. 92-E-80, 1996 WL 734724 (Chi. Comm'n Hum. Rel. Feb. 21, 1996), *aff'd*, No. 96 CH 03266 (Ill. Cir. Ct. Aug. 12, 1999) (unpublished opinion), *appeal docketed*, No. 1-993018 (Ill. App. Ct. Aug. 23, 1999).

vision of what Scouting stands for.”¹⁷⁸ He noted that “[n]ot a single witness testified that as part of his Scouting experience, he was taught that homosexuality was immoral”¹⁷⁹ and that all witnesses agreed that there was not a single BSA publication that defined the terms “morally straight” and “clean” to refer to sexual orientation.¹⁸⁰

Prior to Dale’s expulsion from the BSA, the only official BSA statement on homosexuality was contained in a 1978 policy statement¹⁸¹ (never distributed beyond the Executive Council) and an isolated paragraph in the 1986 Boy Scout Handbook which said:

[i]ncidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. It is important to distinguish between youthful acts of innocence, and the practices of a homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence. Assist him in securing professional help.¹⁸²

Note that this statement does not say that homosexuality isn’t “morally straight” or “clean” and it does not order or advise that the Scoutmaster expel the homosexual boy. It seems to simply be a warning for Scoutmasters to be wary of predatory individuals using the BSA for sexual contacts. The fact that the BSA does not expel heterosexuals who speak favorably of GLBT rights¹⁸³ further undermines any claim that opposition to homosexuality is an “expressive goal” of the BSA.

As the majority correctly asserts, protection under the First Amendment does not require that a viewpoint be rational, effective, or even consistent.¹⁸⁴ However, it must at least be sincere. It is well-known that exemption from some laws of general applicability for religious reasons (such as a conscientious objector’s refusal to enter the draft, or an Amish family’s resistance to public education) is possible only if the religious belief is sincerely held. To allow otherwise would invite a rash of pretextual claims that would seriously undermine the law’s effectiveness.¹⁸⁵

178. *Id.* at *30.

179. *Id.*

180. *See id.* at *12.

181. *See supra* note 134 and accompanying text.

182. Note, *A Scout Is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM. & MARY L. REV. 919, 946-47 (1989) (quoting BOY SCOUTS OF AMERICA, THE OFFICIAL BOY SCOUT HANDBOOK, 134 (7th ed. 1986)).

183. *See Hutchinson, supra* note 72, at 109.

184. *See Boy Scouts of Am. v. Dale*, 120 S. Ct. at 2452.

185. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 287 (N. J. Super Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *rev’d*, 120 S. Ct. 2446 (2000).

For example, in *Brown v. Dade Christian Schools, Inc.*, a private Christian school sought the right to exclude black students by alleging that it held a sincere religious belief that integration was immoral.¹⁸⁶ Instead of simply taking school officials word on its belief, the court conducted an independent examination of the evidence and held that the school's "religious belief" was a mere pretext for an otherwise secular discriminatory policy: "[T]he absence of references to school segregation in written literature stating the church's beliefs, distributed to members of the church and the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion."¹⁸⁷ The court noted that "if belief in school segregation was religious in nature, neither the officers of the school nor the congregation of the church were aware of it."¹⁸⁸ Similarly, if opposition to homosexuality was a sincerely held belief of the BSA, neither its members nor the general public realized it at the time of Dale's expulsion.¹⁸⁹

As the court in *Richardson* said, "an organization with a defined body of doctrine cannot just choose to interpret its goals differently from their stated meaning merely to justify a discriminatory . . . policy. There must be an element of 'bona fideness' in the interpretation."¹⁹⁰ Allowing the BSA to claim that it is engaged in expressive association on the issue of homosexuality simply because of a few isolated policy statements internally circulated by its Executive Council sets a dangerous precedent. "[T]he argument that [a] court should not determine whether a group's message is actually part of its reason for existing could . . . devastate states' abilities to end discrimination against minority groups."¹⁹¹ If public accommodations statutes are to be more than parchment barriers against discrimination, a court must explore whether the discriminatory policy is actually related to a sincerely held view of the organization or is a pretext designed merely to justify prejudicial and stereotypical views.

186. 556 F.2d 310 (5th Cir. 1977).

187. *Id.* at 312.

188. *Id.* at 313.

189. For a fascinating look at how the BSA's leadership runs the organization with very little input from its actual members, see Chuck Sudetic, *The Struggle for the Soul of the Boy Scouts*, ROLLING STONE, July 6, 2000, available at 2000 WL 10819373.

190. *Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724, at *32 (Chi. Comm'n Hum. Rel. Feb. 21, 1996), *aff'd*, No. 96 CH 03266 (Ill. Cir. Ct. Aug. 12, 1999) (unpublished opinion), *appeal docketed*, No. 1-993018 (Ill. App. Ct. Aug. 23, 1999).

191. Dayton, *supra* note 167, at 387, 422-23.

2. Would the Organization's Expression Be Seriously Burdened by the Member's Inclusion?

The majority opinion argued that if the BSA "teaches . . . by example"¹⁹² that homosexuality is wrong then "Dale's presence would . . . force the organization to send a message, both to the youth members and the world, that [it] accepts homosexual conduct as a legitimate form of behavior."¹⁹³ In some instances, the majority is correct that the mere presence of an otherwise-excluded individual would compromise the views of an organization. For example, members of the NAACP once brought suit under a public accommodations law to be included in a march by the Ku Klux Klan.¹⁹⁴ Obviously, since racial separation is the primary goal of the KKK, its message would be compromised if it had to include black members. As the court said, "[i]f ever there was a case where the membership and the message was coextensive, it is here."¹⁹⁵ However, Dale's forced inclusion into the BSA is not this type of situation. Even assuming the BSA does engage in expressive association on homosexuality, Dale's presence would not seriously burden this message for several reasons.

First, status is not the same as advocacy. Although one commentator argues that "[t]o be an avowed homosexual is to assert that a homosexual lifestyle is a political and moral right,"¹⁹⁶ being open and honest about one's factual status is not the same thing as propounding the view that one's status is preferable to others or is even desirable at all. Admitting that one is white, female, or American is not the same thing as advocating White Supremacy, feminism, or patriotism. Similarly, answering a factual question about one's sexual orientation does not require a belief that the sexual orientation is desirable. In somewhat stronger language, "[c]ourts that treat a gay person's openness about his or her identity as 'advocacy' again fall prey to heterosexist, if not homophobic, biases, and, in the process, grant constitutional protection to 'overbroad assumptions' based on nothing more than stereotypical notions that the Supreme Court warned against in *Roberts*."¹⁹⁷

Second, the sheer size of the BSA makes it unlikely that the general public or even its own members will regard the presence of an individual

192. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2454.

193. *Id.*

194. *See Invisible Empire of the Knights of the Ku Klux Klan, Maryland Chapter v. Town of Thurmont*, 700 F. Supp. 281 (D. Md. 1988).

195. *Id.* at 289.

196. Note, *supra* note 183, at 919, 947.

197. Frey, *supra* note 19, at 607.

as the organization's endorsement of his or her status.¹⁹⁸ The BSA currently has over 5 million members and its views are not likely to be clouded by the addition of a handful of homosexual Scouts.

One commentator's fear that "[b]y 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"¹⁹⁹ is unwarranted because inclusion of an unwanted member is less likely to burden an organization's views when it has a good excuse. Rather than supporting those views, "[a]ll that an organization can really be understood to have 'said' by retaining someone protected against discrimination by the civil rights law is that the organization obeys the law."²⁰⁰ For example, when a court ordered the integration of an all-white private school in *Brown v. Dade Christian Schools, Inc.*, it stated that "[the school's] argument that admission of blacks would itself convey an undesirable message . . . carries little weight . . . [a]lthough . . . voluntary enrollment of blacks might communicate such a message, desegregation in response to a [court order] would not."²⁰¹ Had the BSA been forced to include Dale by court order, his presence would have said very little about the organization's views.

Finally, the majority opinion ignored the fact that any incidental burden on the BSA's views regarding homosexuality could be easily mitigated by the organization. For example, in all future Scout handbooks the group could place a statement in large bold print such as: "The Boy Scouts of America believes that homosexuality is inconsistent with Scouting values; however, the organization follows all applicable state and federal law." Such a message would probably more than compensate for any burden Dale's presence would present. A view similar to this was taken by the Supreme Court in *Pruneyard Shopping Center v. Robins*, where a privately owned shopping mall was forced to allow petitioning by private individuals.²⁰² Although the mall owner feared that the public would think he was propounding the petitioner's message, the Court stated that "[the mall operator] can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."²⁰³

198. See ACLU Amicus Brief at 10, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

199. Doering, *supra* note 167, at 644, 661.

200. ACLU Amicus Brief at 15, 120 S. Ct. 2446 (2000).

201. *Id.* at 321.

202. 447 U.S. 74 (1980).

203. *Id.* at 87.

The fact that Scoutmasters are directed not to speak about sexuality at all²⁰⁴ further limits any alleged damage Dale's presence could do, and, if the organization wished it, he could even be required to teach that homosexuality was immoral.

3. Does the State's Compelling Interest in Ending Discrimination Outweigh the Burden Imposed on the Organization?

In *Roberts*, seven members of the Supreme Court agreed that a state's commitment "to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order."²⁰⁵ In *Rotary*, this statement was repeated by the Court.²⁰⁶ Notably absent from this statement was the requirement that only the elimination of discrimination on the basis of sex or race, for example, serves compelling state interests. Discrimination on the basis of sexual orientation, like other forms of discrimination unrelated to merit, is detrimental to society and states therefore have a strong public policy interest in eliminating it. The New Jersey Supreme Court stated that the goal of its public accommodations law is the eradication of "the cancer of discrimination of all types from our society,"²⁰⁷ and in enacting this statute the New Jersey legislature stated that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic state."²⁰⁸

Although the Supreme Court has never stated such a rule, at least one commentator has argued that states only have a compelling interest in ending discrimination against members of a "suspect class."²⁰⁹ However, this confuses two conceptually distinct ideas. The idea of a "suspect class" is generally used in equal protection cases to decide whether a court must apply a strict (or intermediate) scrutiny test as opposed to a mere rational basis test. In such cases, the state is seeking to justify discrimination against a certain group. In cases like *Dale*, however, the state is seeking to *end* discrimination against a certain group. Certainly the latter is much more preferable than the former, and

204. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. at 2462.

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

206. See *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987).

207. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1227 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000) (quoting *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978)).

208. Dayton, *supra* note 191, at 401 (quoting N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999)).

209. See Doering, *supra* note 199, at 666.

it follows that courts should be more deferential to state action brought under public accommodations laws.

The argument could be made that homosexuals as a group hold many of the same characteristics as women or racial minorities. Each has a long history of being subject to discrimination, unfair laws, violence, and political powerlessness. Race, sex, and sexual orientation are all immutable characteristics. The argument could also be made that homosexuals as a minority group are different in many ways as well; for example, homosexuals can hide who they are easily, but are statistically a much smaller segment of the population than either women or most racial minorities. However, it seems unproductive to try to wage minority groups against each other in this way to determine which merits protection. The fact remains that each group has a long history of oppression and states therefore have a compelling interest in protecting each of them from invidious discrimination. When balanced against the slight infringement (if any) Dale's presence would have on the BSA's views, it seems clear that the majority erred in its decision.

IV. CONCLUSION

The effect of the *Dale* decision on future right-to-exclude cases is difficult to determine because of its unique mix of one of the nation's most divisive issues with one of the nation's most cherished institutions. This Note has argued that the *Dale* majority deviated from prior precedents in holding that the BSA was engaged in expressive activity solely by referring to official policy statements. It has also argued that Dale's inclusion would not substantially burden the BSA's ability propound its views and that any incidental burden would be justified by New Jersey's compelling interest in ending discrimination on the basis of sexual orientation.

Although the litigation is over, for the BSA the battle has just begun. Responses to the BSA's discriminatory policy or the *Dale* decision have included trivial things like one school system's forbidding the organization from having special in-school communication privileges²¹⁰ and a city denying them the free use of a dock.²¹¹ However, more serious repercussions have occurred, including the State of Connecticut²¹² and the City of San Francisco²¹³ barring employee-payroll

210. See PlanetOut News Staff, *Davis, CA Schools Stifle Scouts*, PLANETOUT NEWS, Dec. 15, 1999 <http://www.planetout.com/news/article.html?1999/12/15/3>.

211. See PlanetOut News Staff, *No Free Berkeley Berth for BSA*, PLANETOUT NEWS, May 6, 1998 <http://www.planetout.com/news/article.html?1998/05/06/5>.

212. See PlanetOut News Staff, *Scouts Win Round in CT Lawsuit*, PLANETOUT NEWS, July 14, 2000 <http://www.planetout.com/news/article.html?2000/07/14/1>.

deductions for the BSA. The City of Chicago agreed to end all funding for the BSA until it ends its discriminatory practices²¹⁴ and the City of Tucson is considering doing the same.²¹⁵ Private corporate sponsors such as Levi Strauss, Wells Fargo Bank, and BankAmerica ended sponsorship of the organization years ago,²¹⁶ and more are sure to follow as the BSA's practices become better known. In recent weeks, the BSA Headquarters has been the site of protests.²¹⁷ House members wrote a letter to President Clinton calling on him to resign as honorary head of the organization,²¹⁸ and legislation has been introduced to strip the group's federal charter.²¹⁹ The effect of these and future responses to the *Dale* decision is uncertain, but it seems clear that the BSA will have an increasingly difficult time justifying its ban in the face of an increasingly tolerant society, especially when similar groups like the Girl Scouts, 4-H Clubs, and Boy Scouts of Canada have nondiscrimination policies already in place.²²⁰

For James Dale, the Supreme Court's decision is a chance to move on with his life. Expelled in 1990 at the age of twenty, Dale has spent the last ten years of his life involved in ugly and contentious litigation. It is sadly ironic that this epic struggle began with Dale's attendance at a seminar on the psychological health problems of GLBT adolescents. It seems clear that the BSA would rather perpetuate these problems in a new generation of children instead of changing its discriminatory practices.

By substituting Dale as the plaintiff, the words of Justice Mosk of the California Supreme Court, considering another case of the BSA's discrimination on the basis of sexual orientation, seem fitting:

That the law does not prohibit the [Boy Scouts of America] from shutting [Dale] out cannot obscure the fact that he is the very kind of person whom it should receive most eagerly—a person whom it has itself honored as an

213. See PlanetOut News Staff, *SF Charity Drive Drops Scouts*, PLANETOUT NEWS, Apr. 29, 1998 <http://www.planetout.com/news/article.html?1998/04/29/3>.

214. See PlanetOut News Staff, *Chicago Won't Sponsor Scouts*, PLANETOUT NEWS, Feb. 6, 1996 <http://www.planetout.com/news/article.html?1998/02/06/4>.

215. See PlanetOut News Staff, *Tucson Com. Nixes Biased NPOs*, PLANETOUT NEWS, July 19, 2000 <http://www.planetout.com/news/article.html?2000/07/19/3>.

216. See Lisa A. Hammon, Note, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L.J. 1385, 1398 (1992).

217. See PlanetOut News Staff, *Scouts Protested in Baltimore*, PLANETOUT NEWS, July 5, 2000 <http://www.planetout.com/pno/news/article.html?2000/07/05/3>.

218. See David Judson, *House Members Call Clinton to Protest Scouts' Gay Ban*, GANNETT NEWS SERV., July 14, 2000, available at 2000 WL 4402428.

219. See PlanetOut News Staff, *Bill to Pull BSA's Federal Charter*, PLANETOUT NEWS, July 20, 2000 <http://www.planetout.com/pno/news/article.html?2000/07/20/1>.

220. See Ken Darling, *Scouts Would Love to Have Lost Supreme Court Case*, (Minneapolis-St. Paul) STAR-TRIB., July 9, 2000, available at 2000 WL 6979781.

Eagle Scout. Regrettably, the situation will remain such until the law changes. Or, perhaps, until the ideals of scouting transforms its conduct.²²¹

221. *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 240 (Cal. 1998) (Mosk, J., concurring) (citation omitted).