

The Restoration of States' Civil Rights Authority: An Alternative Approach to Expressive Association After *Boy Scouts of America v. Dale**

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This note argues the Supreme Court erred in upholding the Boy Scouts of America's right to exclude homosexuals by virtue of its First Amendment freedom of expressive association. By way of introduction, the author observes Dale's noticeable resemblance to the disgraced opinions of the nineteenth and twentieth century in which the Court upheld the legality of gender and race-based discrimination. The author then summarizes the Court's expressive association jurisprudence and—applying this framework to the facts of Dale—argues the Court erroneously concluded that (1) the Boy Scouts maintained an anti-gay expressive message; (2) Dale's reinstatement infringed upon that message; and (3) such infringement is not outweighed by a compelling state interest. The author next discusses the regulatory power of state governments in preventing invidious discrimination and—through a series of hypotheticals—examines the extent to which Dale compromises this authority. Finally, the author concludes with an innovative approach for analyzing issues of expressive association that both squares with precedent and circumvents the problematic aspects of Dale.

To stave experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.¹

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** The Ohio State University Moritz College of Law, Class of 2002. This note is dedicated to my parents, Patrick and Marcia, and my sister, Bethany, for their unwavering support throughout my academic career. Special thanks to my life-long friends and colleagues, Nicholas Chordas, Marc Mellion, and Daniel Saros, for their years of loyal friendship and support. I am indebted, finally, to Professors Steven Ludd and Dale Smith, whose influence and teachings have profoundly shaped my life.

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

I. INTRODUCTION

In 1872, Myra Bradwell, a married woman and resident of Illinois, applied to the state supreme court for a license to practice law.² The court denied her petition on the basis that married women did not possess the capacity to enter into binding contracts and, therefore, were incapable of establishing the legal covenant inherent between attorney and client.³ Mrs. Bradwell appealed to the United States Supreme Court, alleging that the state's denial of her petition violated the Fourteenth Amendment and the Privileges and Immunities Clause of the Federal Constitution.⁴ In affirming the decision of the Illinois Supreme Court, three justices concurred that "nature herself...has always recognized a wide difference in the respective spheres and destinies of man and woman... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."⁵

In 1958, Mildred Jeter, an African American woman, and Richard Loving, a Caucasian man, were lawfully married in the District of Columbia.⁶ Shortly thereafter, the Lovings returned to their home state of Virginia, where they were indicted and sentenced to one year in jail for violating the state's statutory ban on interracial marriages.⁷ The Lovings challenged their convictions in the United States Supreme Court on the ground that Virginia's anti-miscegenation statute violated the Equal Protection Clause of the Fourteenth Amendment.⁸ The Court invalidated the Virginia statute, criticizing the trial judge's contention that "[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents... The fact that he separated the races shows that he did not intend for the races to mix."⁹

Justice Stevens extolled Justice Brandeis' comment on states' right to experiment with "things social" in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 663-64 (2000) (Stevens, J., dissenting). See Paul D. Carrington, *Legal Ethics, Fair Trials and Free Press: Article Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1187 (2001) ("Particularly at a time when sexual mores are changing, there is much to be said for allowing states to experiment with diverse policies in the manner long advocated by Justice Brandeis, especially when an experiment has no significant extraterritorial effects").

² *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873).

³ *Id.* at 141.

⁴ *Id.* at 137 (noting that Ms. Bradwell claimed "she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State").

⁵ *Id.* at 141 (Bradley, J., concurring).

⁶ *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

⁷ *Id.* at 3; see VA. CODE ANN. § 20-58 (Michie 1960). Specifically, the statute defined "colored person" to mean "[e]very person in whom there is ascertainable any Negro blood... except... members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood." *Id.* § 1-14. Virginia was one of sixteen states that prohibited and punished marriages on the basis of racial classifications in 1967. *Loving*, 388 U.S. at 6.

⁸ 388 U.S. at 2.

⁹ *Id.* at 3. Alexis de Tocqueville argues that anti-miscegenation statutes were enacted at a

And on the threshold of the twenty-first century, James Dale, an exemplary Boy Scout of twelve years and an assistant scoutmaster, attended a seminar addressing the psychological and health needs of gay and lesbian adolescents.¹⁰ A local newspaper covering the event identified Dale as the co-president of the Gay-Lesbian Alliance at Rutgers University.¹¹ In response to the article, leaders of the Boy Scouts of America (BSA) forwarded Dale a letter revoking his membership and requesting he sever all ties with the organization.¹² Soon thereafter, Dale filed a complaint against the BSA, alleging the revocation of his membership violated New Jersey's public accommodation statute.¹³ On appeal, the United States Supreme Court denied Dale's complaint, deferring to the BSA's contention that application of the statute would infringe upon the organization's right to expressive association by virtue of "homosexual conduct [being] inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight' and 'clean.'"¹⁴

This triad of cases makes clear that many forms of inequitable treatment now proscribed by civil rights legislation are, or have been, justified on moral grounds.¹⁵ The moral foundation of such cases, however, has historically been

time when "[t]he chief care of the legislators in this body of penal laws was the maintenance of orderly conduct and good morals in the community; thus they constantly invaded the domain of conscience, and there was scarcely a sin which was not subject to magisterial censure." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 38-39 (Phillips Bradley ed., 1972). Such legislation, de Tocqueville contends, is "discreditable to human reason" and "bears such striking marks of a narrow, sectarian spirit and of those religious passions which had been warmed by persecution." *Id.*

¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644-45 (2000).

¹¹ *Id.* at 645.

¹² *Id.* (noting that after Dale requested an explanation for his membership revocation, the BSA responded that the organization "specifically forbid[s] membership to homosexuals").

¹³ *Id.* The New Jersey statute prohibits discrimination based on sexual orientation in places of public accommodation. N.J. STAT. ANN. § 10:5-4 (West Supp. 2000).

¹⁴ *Dale*, 530 U.S. at 650.

¹⁵ The *Bradwell* concurrence, for example, appealed to "Nature" and the "Creator." Similarly, the trial judge in *Loving* referred to the divine intention of "God" and *Dale* accepted the BSA's interpretation of the terms "morally straight" and "clean." *Dale*, 530 U.S. at 701 (Souter, J., dissenting) (noting that Justice Stevens "describes the changing attitudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender"); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1242-43 (N.J. 1999) (Handler, J., concurring) ("Like stereotypes about an individual based on sex or race, similar assumptions about a lesbian or gay man are false and unfounded, and reveal nothing about that individual's moral character, or any other aspect of his or her personality."). Indeed, the semblance of these decisions has been recognized by many of the BSA's strongest supporters. See, e.g., Richard Weizel, *In Hopes of Reviving Donations: A Pamphlet*, N.Y. TIMES, Feb. 11, 2001, at 14CN3 (noting that a board member of a local United Way, voting to approve a non-discrimination policy that would withhold funds from BSA programs, stated that such language "reminds me of the same kind of language that was used concerning African-Americans and other minority groups 30 or 40 years ago"); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 482 (2001) (stating that anti-gay laws display "a noticeable resemblance to the map of miscegenation bans that one could have drawn for the Court in [*Loving*]").

problematic in two respects. First, decisions providing a moral basis for discriminatory practices have proven unreliable in their long-term stability.¹⁶ In *Planned Parenthood v. Casey*,¹⁷ for example, the Supreme Court denounced the invidious gender discrimination manifest in the *Bradwell* concurrence,¹⁸ declaring that such views “are no longer consistent with [the Court’s] understanding of the family, the individual, or the Constitution.”¹⁹ In similar fashion, the Court rejected the racial segregation endorsed by the trial judge in *Loving*—albeit over a decade earlier—in *Brown v. Board of Education*,²⁰ thereby overruling the “separate but equal” doctrine set forth in *Plessy v. Ferguson*.²¹

Second, decisions justifying discriminatory practices on moral grounds have proven defective in their present-day application.²² In contrasting the social eras in which *Brown* and *Plessy* were decided, for example, the *Casey* Court noted that although “[s]ociety’s understanding of the facts upon which a constitutional

¹⁶ See, e.g., *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 300 (1987) (White, J., dissenting) (asserting that the *Bradwell* decision upheld legislation “which perpetuated sex-role stereotypes and which impeded women in their efforts to take their rightful place in the workplace”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (referring to *Bradwell* as an example of an attempt “to exclude women from particular areas simply because [the state] believed women were less able than men to perform a particular function”); *Dothard v. Rawlinson*, 433 U.S. 321, 344 (1977) (Marshall, J., dissenting) (describing *Bradwell* as “long since discredited”); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (citing the *Bradwell* concurrence to support the proposition that “our Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage”).

¹⁷ 505 U.S. 833 (1992).

¹⁸ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 321 (1993) (Stevens, J., dissenting) (noting that the basic attitude of the three concurring justices in *Bradwell* is properly characterized as “invidiously discriminatory”).

¹⁹ *Casey*, 505 U.S. at 897.

²⁰ 347 U.S. 483 (1954).

²¹ 163 U.S. 537, 552 (1896) (upholding a statute requiring the separation of African Americans and Caucasians in public conveyances). The *Brown* Court declared that “[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected.” *Brown*, 347 U.S. at 494–95. In rejecting the Fourteenth Amendment challenge in *Plessy*, the Court had used similar morally-based language as *Bradwell* and *Loving*, stating “in the nature of things” the Amendment “could not have been intended to abolish distinctions based upon color.” *Plessy*, 163 U.S. at 544; see Roger Wilkins, Editorial, *The Court’s Term Is Over, But Not the Discord*, N.Y. TIMES, June 30, 2000, at A24 (“Chief Justice William H. Rehnquist’s opinion in the Boy Scouts case . . . combines the disgrace[d] reasoning in *Plessy v. Ferguson* . . . and the United States military’s unworkable ‘don’t ask, don’t tell’ policy.”).

²² Professor Paul D. Carrington notes that when “[t]here is a genuine collision of moral values, . . . one might . . . think its resolution an appropriate matter for democratic self-government.” Carrington, *supra* note 1. The unsuitability of judicial activism in the area of social mores is exacerbated in light of the significant impact such decisions play in shaping public sentiment. See Christopher Wolfe, *Forum on Public Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 92 (2000) (noting that the Court’s role “establishes the legal norms that indirectly but powerfully contribute to the formation of future public opinion”); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM 59–60 (1996) (reviewing the impact of judicial activism on social mores).

ruling was sought in 1954 was . . . fundamentally different from the basis claimed for the decision in 1896[.] . . . we think *Plessy* was wrong the day it was decided . . .”²³ *Casey* thus fashions the notion that decisions legalizing discrimination may not be justified solely by the moral values of their era.²⁴ Instead, these decisions may be problematic in their present-day application, irrespective of the Court’s moral principles or those of the social majority.²⁵

This note contends the Supreme Court erred in holding that Dale’s reinstatement would violate the BSA’s freedom of expressive association and, in so doing, raised concerns with respect to both its long-term stability and its present-day legitimacy in authorizing discrimination. Part II of this note provides a background on the Court’s First Amendment jurisprudence regarding the right to intimate and expressive association. Part III argues that *Dale* is inconsistent with this jurisprudence in its conclusions that (1) the BSA maintained an anti-gay expressive message; (2) Dale’s reinstatement infringed upon that message; and (3) such infringement is not outweighed by a compelling state interest. Part IV discusses the regulatory power of state governments in preventing invidious discrimination and the extent to which *Dale* compromises this authority. Finally, Part V concludes with an innovative approach for analyzing issues of expressive association that both squares with precedent and circumvents the problematic aspects of *Dale*.

II. BACKGROUND: FREEDOM OF ASSOCIATION

In the years between 1984 and 1988, the United States Supreme Court decided three cases in which organizations invoked the right of free association to defend against anti-discrimination statutes.²⁶ The Court’s interpretation of associational protection in these cases, in turn, provided the jurisprudential foundation on which *Dale* was decided over a decade later.²⁷ A sound comprehension of *Dale* thus requires a brief history of this foundation.

The First Amendment to the Federal Constitution provides that “Congress shall make no law . . . abridging the freedom of speech . . .”²⁸ This clause,

²³ *Casey*, 505 U.S. at 863.

²⁴ *See id.*

²⁵ Indeed, Justice Souter separately dissented in *Dale* to make clear that “[t]he right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group’s rights.” *Dale*, 530 U.S. at 701 (Souter, J., dissenting).

²⁶ *See* *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary, Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

²⁷ *See, e.g., Dale*, 530 U.S. at 658 (“[I]n the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn.*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any ‘serious burden’ on the organization’s rights of expressive association.”).

²⁸ U.S. CONST. amend. I.

applicable to the states through the Fourteenth Amendment, has been interpreted to comprehend a “freedom of association”²⁹ in two distinct senses.³⁰ In one sense, freedom of association contemplates the right to “intimate association,” which precludes the state from intruding against an individual’s decision to enter or maintain intimate human relationships.³¹ In the other sense, freedom of association contemplates the right to “expressive association,” which precludes the state from intruding against an organization’s First Amendment expressive activities, such as speech and religion.³² Although both forms of association may be implicated when the state interferes with an organization’s selection of individuals for a common endeavor, the degree of constitutional protection varies depending on the extent to which each liberty is jeopardized.³³ The following sections discuss the Court’s jurisprudence with respect to each aspect of protected association.

A. *Freedom of Intimate Association*

The right of intimate association safeguards an individual’s decision to establish and preserve “highly personal relationships” from unjustified state interference.³⁴ This protection derives from the constitutional recognition of the fundamental role such relationships play in safeguarding individual freedom.³⁵ In this respect, freedom of association affords protection as a fundamental element

²⁹ The Supreme Court did not formally recognize the freedom of association as an implied constitutional right until *NAACP v. Alabama ex rel. Patterson*, in which the Court struck down a government order for the membership list of the NAACP. 357 U.S. 449, 462–64 (1958). Justice Harlan, writing for a unanimous Court, held that such a requirement burdened the organization’s ability to associate and pursue its collective goals. *Id.* Such infringement, the Court concluded, may be overridden only by a compelling state interest, which the state had failed to demonstrate. *Id.* For an array of viewpoints on the freedom of association, see generally ALIDAIR MCINTYRE, *AFTER VIRTUE* (1981); ROBERT A. NISBET, *COMMUNITY AND POWER* (1962); NANCY L. ROSENBLUM, *ANOTHER LIBERALISM* (1987); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); Kenneth L. Karst, *Equality and Community; Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183 (1980).

³⁰ *Roberts*, 468 U.S. at 617.

³¹ *Id.* at 618. The notion of intimate association was first suggested in Kenneth L. Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Reena Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977).

³² *Roberts*, 468 U.S. at 618.

³³ *Duarte*, 481 U.S. at 544–45 (1987) (noting that the Court determines “the nature and degree of constitutional protection by considering separately the effect of the challenged state action on individuals’ freedom of private association and their freedom of expressive association”).

³⁴ *Roberts*, 468 U.S. at 618; see *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

³⁵ *Roberts*, 468 U.S. at 618.

of personal liberty.³⁶

The Supreme Court has historically considered factors such as size, purpose, and selectivity in determining whether an organization warrants the protection of intimate association.³⁷ Familial bonds, for example, are by their very nature highly intimate affiliations, characterized by small numbers, a high degree of selectivity, and seclusion from others in critical aspects of the relationship.³⁸ Conversely, organizations lacking these characteristics, such as large business enterprises, are unlikely to give rise to the concerns underlying the right to intimate association and, consequently, fail to invoke its protection.³⁹ Between these extremes, however, the Court has been indisposed to specify the level of protection afforded an individual's decision to enter into, or exclude someone from, a particular association.⁴⁰

Perhaps the most significant intimate association decision to emerge from contemporary jurisprudence is *Roberts v. United States Jaycees*,⁴¹ in which two local chapters of the Jaycees violated the organization's bylaws by admitting women as regular members.⁴² In response, the Jaycees' national president advised the chapters that a motion to revoke their charters would be considered at a forthcoming meeting.⁴³ The chapters filed charges of discrimination with the Minnesota Department of Human Rights, alleging the exclusion of women violated the Minnesota Human Rights Act's prohibition of gender discrimination in places of public accommodation.⁴⁴ On appeal, the Supreme Court rejected the

³⁶ *Id.*; *Duarte*, 481 U.S. at 545 (“[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.”).

³⁷ *Roberts*, 468 U.S. at 620; *see, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 62–63 (2000) (holding that an order granting visitation rights to the grandparents unconstitutionally interfered with the fundamental right of parents to rear children); *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (striking down a Wisconsin statute that prohibited residents from marrying if they were negligent in their child support obligations); *Carey v. Populations Servs. Int'l*, 431 U.S. 687, 702 (1977) (holding that a New York statute prohibiting the advertisement and sale of contraceptives to minors was an unjustified state intrusion on decisions concerning child bearing); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (invalidating a municipality's housing ordinance that categorized a second grandchild living in a home as an illegal occupant).

³⁸ *Roberts*, 468 U.S. at 620.

³⁹ *Id.*

⁴⁰ *Id.* For a general discussion on the intimate association rights of small, private organizations, see Michael M. Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321 (1983).

⁴¹ 468 U.S. at 620. Although the concept of intimate association was originally discussed in *Karst*, *supra* note 31, *Roberts* was the first case to explicitly recognize the concept as a distinct aspect of associational freedom.

⁴² The purpose of the Jaycees, as stated in its bylaws, was to pursue “such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States . . .” *Roberts*, 468 U.S. at 612.

⁴³ *Id.* at 614.

⁴⁴ *Id.* The Minnesota Human Rights Act provides that it is an unfair discriminatory practice “[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color,

Jaycees' intimate association defense, concluding that the organization lacked the distinctive characteristics sufficient to invoke First Amendment protection.⁴⁵ To the contrary, each of the chapters included over four hundred members, actively recruited with no criteria for judging membership, and only denied applicants on the basis of gender.⁴⁶

The *Roberts* decision marked a historic determination in favor of a narrowing approach to the right of intimate association and remains the foremost authority on the stringent organizational requirements necessary to invoke its protection.⁴⁷ Indeed, its analytic framework served as the basis for the Court's rejection of the intimate association claims in two leading cases discussed in the following section—*Bd. of Directors of Rotary, Int'l v. Rotary Club of Duarte*⁴⁸ and *New York State Club Ass'n, Inc. v. City of New York*.⁴⁹ As in *Roberts* and *Dale*, however, the organizations involved in these cases attempted to defend against civil rights legislation not only on intimate association grounds, but also on the theory that such statutes violated their right to expressive association.⁵⁰

B. *Freedom of Expressive Association*

Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of those activities.⁵¹ The *Roberts* Court observed that an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be

creed, religion, disability, national origin or sex." MINN. STAT. ANN. § 363.03(3) (West Supp. 1984). In addition, the Act defined "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." *Id.* § 363.01(18).

⁴⁵ *Roberts*, 468 U.S. at 621.

⁴⁶ *Id.* Moreover, the Court noted that "numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings." *Id.*

⁴⁷ See Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1885 (1984) (discussing that although intimate association "has important implications for other private associations with discriminatory membership policies," the concept is inapplicable to large organizations).

⁴⁸ 481 U.S. 537, 549 (upholding a statute prohibiting discrimination on the basis of gender in places of public accommodation).

⁴⁹ 487 U.S. 1, 14 (denying a facial challenge to a city ordinance prohibiting discrimination by institutions that include over four hundred members, provide regular meal service, and receive payment from nonmembers).

⁵⁰ *Id.* at 13; *Duarte*, 481 U.S. at 544–45.

⁵¹ *Roberts*, 468 U.S. at 622. As a result, the Court has held that "impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendment . . ." *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring).

vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends [was] not also guaranteed.”⁵² The Constitution thus guarantees the freedom of expressive association as an indispensable means of preserving other First Amendment liberties.⁵³

State infringement of an organization’s right to expressive association has traditionally taken three forms.⁵⁴ First, infringement may occur when the government requires disclosure of membership lists from an organization seeking anonymity.⁵⁵ Second, interference may arise when the government imposes penalties on, or withholds benefits from, individuals based on their affiliation to a particular group.⁵⁶ Finally, state infringement may take the form of legislation that interferes with the internal affairs of a given organization, such as a statute that prohibits discriminatory membership practices.⁵⁷ In this respect, “[f]reedom of association . . . plainly presupposes a freedom not to associate.”⁵⁸

Organizations seeking immunity from such infringement must engage in the requisite First Amendment activity to implicate its protection. Although this protection is not reserved for advocacy groups, an organization must engage in “some form of expression” to fall within its ambit.⁵⁹ In application, this requirement has been interpreted leniently, such that “[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”⁶⁰

Moreover, organizations seeking protection from state infringement must demonstrate that the challenged state action interferes with their expressive activity. The Supreme Court has noted, for example, that the forced inclusion of an unwanted individual infringes upon an organization’s freedom of expressive association if the presence of that person “affects in a significant way” the group’s ability to advocate public or private viewpoints.⁶¹ Accordingly, courts must

⁵² *Roberts*, 468 U.S. at 622.

⁵³ *Id.* (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”); *see, e.g.*, *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 482–85 (1965); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

⁵⁴ *Roberts*, 468 U.S. at 622–23.

⁵⁵ *Id.*; *see, e.g.*, *Patterson*, 357 U.S. at 462–63; *Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982).

⁵⁶ *Roberts*, 468 U.S. at 622; *see, e.g.*, *Healy v. James*, 408 U.S. 169, 180–84 (1972).

⁵⁷ *Roberts*, 468 U.S. at 622; *see, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

⁵⁸ *Roberts*, 468 U.S. at 623; *see* Kevin Francart, Comment, *No Dogs Allowed: Freedom of Association v. Forced Inclusion Anti-Discrimination Statutes and Their Applicability to Private Organizations*, 17 T.M. COOLEY L. REV. 273 (2000) (“[T]he freedom not to associate is plainly presupposed from the freedom of association.”).

⁵⁹ *Dale*, 530 U.S. at 648.

⁶⁰ *Roberts*, 468 U.S. at 636 (O’Connor, J., concurring).

⁶¹ *See, e.g.*, *Dale*, 530 U.S. at 647–48; *New York State Club*, 487 U.S. at 13; *Duarte*, 481 U.S. at 548.

determine the specific content of an organization's expressive message and the degree to which that message would be burdened, affected, or restrained by the challenged statutory requirements.⁶²

The right to expressive association, however, is not absolute.⁶³ State infringement of an organization's expression may be overridden by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."⁶⁴ This consideration requires courts to balance the state interest served by the regulation with the degree of intrusion upon the organization's expression.⁶⁵

Accordingly, the analytic framework of expressive association may be summarized in a three-part analysis: first, courts must consider whether an organization engages in expression; second, courts must inquire whether the state infringes upon that expression; and third, courts must determine whether that infringement is justified by a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved by less restrictive means. The following sections discuss the application of this analytic framework in the context of three leading cases, coined "the *Roberts* trilogy."

1. *The Roberts Trilogy, Part I: Roberts v. United States Jaycees Revisited*

The intrinsic and instrumental characteristics of intimate and expressive association coincide when the state interferes with an organization's selection of individuals for a common endeavor.⁶⁶ The Minnesota Human Rights Act at issue in *Roberts* thus implicated not only the Jaycees' freedom of intimate association, but also its right to associate for expressive purposes.⁶⁷ As a result, the *Roberts* Court, after denying the Jaycees' intimate association claim, shifted its attention to whether the statute unconstitutionally infringed upon the organization's expressive message.⁶⁸

Applying the first prong of the expressive association analysis, the *Roberts* Court determined that the Jaycees engaged in a form of expression sufficient to invoke First Amendment protection given that its members "ha[d] taken public positions on a number of diverse issues" and "engage[d] in a variety of civic, charitable, lobbying, fundraising, and other activities . . ."⁶⁹ In applying the

⁶² *Dale*, 530 U.S. at 647–48.

⁶³ *Id.* at 648.

⁶⁴ *Roberts*, 468 U.S. at 623.

⁶⁵ *Id.*

⁶⁶ *Id.* at 618.

⁶⁷ The *Roberts* Court noted that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated. The Jaycees contend that this is such a case." *Id.*

⁶⁸ *Id.* The Court upheld the lower court's determination that the Jaycees was a "place of public accommodation" for purposes of the statute. *Id.* at 625. "Like many States and municipalities," the Court held, "Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct." *Id.*

⁶⁹ *Id.* at 626–27.

second prong of the analysis, however, the Court concluded that the Jaycees had failed to demonstrate that the Minnesota statute imposed any serious burdens on that expression.⁷⁰ The Court noted that the statute “require[d] no change in the Jaycees’ creed of promoting the interests of young men, and it impose[d] no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.”⁷¹ Yet even presuming an incidental abridgment of the Jaycees’ protected speech, the *Roberts* Court held that the infringement served a “compelling state interest of the highest order” in assuring its citizens equal access to publicly available goods and services.⁷²

2. *The Roberts Trilogy, Part II: Bd. of Directors of Rotary, Int’l v. Rotary Club of Duarte*

The right to expressive association was again explored three years later in *Bd. of Directors of Rotary, Int’l v. Rotary Club of Duarte*,⁷³ in which a local Rotary Club’s charter was terminated by the parent organization, Rotary International, for admitting women in violation of the organization’s constitution.⁷⁴ The local club and two of its female members filed suit, alleging a violation of California’s statutory prohibition of gender discrimination in business establishments.⁷⁵ On appeal before the Supreme Court, Rotary International argued that the forced inclusion of women violated its right to intimate and expressive association.⁷⁶ Applying the analytic framework set forth in *Roberts*, the Court denied Rotary International’s intimate association claim on the basis that the organization was “not the kind of intimate or private relation that warrants constitutional protection” in its size, purpose, and selectivity.⁷⁷ Rather, local Rotary Clubs were characterized by an excessive number of members, reciprocity with other clubs, and strong public involvement.⁷⁸

⁷⁰ *Id.* at 627. The *Roberts* Court focused on the extent to which women would impact the outcomes of the organization’s voting practices, stating that there is “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.” *Id.*

⁷¹ *Id.*

⁷² *Id.* at 624. Note that the third stage of the expressive association analysis requires that the challenged state action not only serve a compelling state interest, but also be achieved by the least-restrictive means and be unrelated to the suppression of ideas. *Id.* at 623. To that end, the Court noted that the “Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.” *Id.*

⁷³ 481 U.S. 537 (1987).

⁷⁴ *Id.* at 541.

⁷⁵ *Id.* at 542.

⁷⁶ *Id.* at 544.

⁷⁷ *Id.* at 546.

⁷⁸ *Id.* The *Duarte* Court emphasized that “[t]he size of local Rotary Clubs ranges from fewer than 20 to more than 900. There is no upper limit on the membership of any local Rotary Club.” *Id.* (citation omitted).

The *Duarte* Court likewise denied Rotary International's expressive association defense.⁷⁹ The Court commenced its analysis by conceding the organization exemplified a form of expression protected by the First Amendment in its "variety of commendable service activities."⁸⁰ As in *Roberts*, however, the Court denied the organization's expressive association claim at the second stage of the analysis, concluding that the inclusion of women did not "affect in any significant way the existing members' ability to carry out their various purposes."⁸¹ Moreover, the Court held that any hypothetical infringement on the organization's right of expressive association was outweighed by the state's compelling interest in eliminating discrimination against women.⁸²

3. *The Roberts Trilogy, Part III: New York State Club Ass'n, Inc. v. City of New York*

One year after *Duarte*, the Court addressed a facial challenge to a statute in *New York State Club Ass'n, Inc. v. City of New York*⁸³ that forbade gender discrimination in any "institution, club, or place of accommodation [that] has more than four hundred members, provides regular meal service, and regularly receives payment from nonmembers for the furtherance of trade or business."⁸⁴ A consortium of 125 clubs and associations filed suit against the city, seeking a declaration that the statute facially violated the First Amendment freedom of intimate and expressive association.⁸⁵ On certiorari, the Supreme Court denied the

⁷⁹ *Id.* at 549.

⁸⁰ *Id.* at 548. These activities, the Court noted, were consistent with the "basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace." *Id.*

⁸¹ *Id.* ("As a matter of policy, Rotary Clubs do not take positions on 'public questions,' including political or international issues.")

⁸² *Id.* at 549. The *Duarte* Court recognized that although the statute may impose "some slight infringement on Rotary members' right of expressive association," such infringement was justified because it serves the compelling interest in eliminating discrimination against women. *Id.* To support this proposition, the Court cited *Buckley v. Valeo*, which held that the right of association may be limited by state regulations necessary to serve a compelling interest and unrelated to the suppression of ideas. *Id.* (citing *Buckley*, 424 U.S. 1, 25 (1976)).

⁸³ 487 U.S. 1 (1988).

⁸⁴ *Id.* at 6 (quoting N.Y.C. ADMIN. CODE § 8-102(9) (1986)). The 1964 Act at issue in *New York State Club* was amended in 1986 to extend the anti-discrimination provisions to any "institution, club or place of accommodation [having] more than four hundred members, provid[ing] regular meal service and regularly receiv[ing] payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y.C. ADMIN. CODE § 8-102(9) (1986). Any such club "shall not be considered in its nature distinctly private." *Id.*

⁸⁵ *New York State Club*, 487 U.S. at 11. The Court noted in *New York State Club* that First Amendment facial challenges may prevail when the challenged statute either "could never be applied in a valid manner" or "may inhibit the constitutionally protected speech of third parties." *Id.* (quoting *City Council in Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)). The Court first concluded that the consortium of clubs failed to demonstrate that the ordinance could never be constitutionally applied, noting that organizations such as the Jaycees would be subject to the statute. *Id.* at 12. The Court then separately addressed whether the

intimate association claim, holding that the statute's regular meal service and nonmember payment requirements were "at least as significant in defining the nonprivate nature of these associations" as the characteristics of the organizations in *Roberts and Duarte*.⁸⁶

In addition, the Court denied the organizations' allegation that the statute infringed upon their freedom of expressive association.⁸⁷ Although noting that the organizations' "selective process of inclusion and exclusion is protected by the Constitution," the Court held that the statute neither significantly affected the association freedom of members nor required the clubs "to abandon or alter" any activity protected by the First Amendment.⁸⁸ Even presuming such infringement, however, the Court recognized the "'compelling interest' in combating invidious discrimination."⁸⁹

4. *Departure from Expressive Association Analysis: Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*

The Supreme Court addressed a variant claim to freedom of expression in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,⁹⁰ in which a group of gay, lesbian, and bisexual descendants of Irish immigrants (GLIB) applied to participate in Boston's annual St. Patrick's Day parade.⁹¹ When parade organizers denied the application, the GLIB obtained an injunction and marched uneventfully among parade participants and spectators.⁹² After the parade organizers refused to admit the GLIB the following year, the group filed suit, alleging a violation of the state's statutory prohibition of discrimination based on sexual orientation in places of public accommodation.⁹³

On appeal, the Supreme Court held that the statutory requirement to admit a parade contingent not of the private organizers' own choosing violated the First Amendment.⁹⁴ Applying the first prong of the analysis, the Court concluded that the parade organizers engaged in a form of expression sufficient to invoke First

statute inhibited the intimate and expressive association of third parties. *Id.* at 12–13.

⁸⁶ *Id.* at 12. These factors, the Court concluded, indicate the non-private nature of the organizations subject to the statute "because of the kind of role that strangers play in their ordinary existence." *Id.*

⁸⁷ *Id.* at 13.

⁸⁸ *Id.* (quoting *Duarte*, 481 U.S. at 548).

⁸⁹ *Id.* at 14 n.5.

⁹⁰ 515 U.S. 557 (1995).

⁹¹ *Id.* at 561.

⁹² *Id.* The City of Boston had authorized the South Boston Allied War Veterans Council, an unincorporated association of individuals elected from South Boston veterans' groups, to organize the St. Patrick's Day parade. *Id.* at 560.

⁹³ *Id.* at 561. Specifically, the Massachusetts statute at issue in *Hurley* prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." MASS. GEN. LAWS ch. 272, § 98 (1992).

⁹⁴ *Hurley*, 515 U.S. at 581.

Amendment protection.⁹⁵ The Court observed that parades were a traditional form of speech, “characterized by flags and banners with all sorts of messages.”⁹⁶ This form of expression, the Court held, receives protection similar to other forms of pure speech, such as newspaper editorials,⁹⁷ noncommercial advertisements in daily papers,⁹⁸ and cable transmissions.⁹⁹

Precisely because of the analogous nature of parades to such forms of pure speech, however, the *Hurley* Court departed from the expressive association framework, instead addressing the parade organizers’ claim in the context of traditional First Amendment analysis.¹⁰⁰ As such, the Court needed only to address whether the leniency with which the organizers admitted participants forfeited its constitutional protection.¹⁰¹ Finding no such forfeiture, the Court declared that “[s]ince every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”¹⁰² Significantly, however, the Court noted that the *individual* participation of gays, lesbians, and bisexuals would not be problematic for purposes of the First Amendment.¹⁰³

5. Conclusions: The Roberts Trilogy and Hurley

The *Roberts* trilogy sets forth principles underpinning each stage of the expressive association analysis, including (1) the types of organizations that engage in a form of expression sufficient to invoke constitutional protection; (2) the degree of state interference necessary to violate the Constitution; and (3) the classes of citizens for whom anti-discrimination statutes serve a

⁹⁵ *Id.* at 569.

⁹⁶ *Id.*

⁹⁷ *Id.* at 570; *see, e.g.*, *Miami Herald Publishing Co. v. Tomillo*, 418 U.S. 241, 258 (1974) (concluding that a statute allowing a political candidate to demand that a newspaper print any reply to criticisms of the candidate is violative of the First Amendment right to free speech).

⁹⁸ *Hurley*, 515 U.S. at 570; *see, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (holding that the First Amendment right to free speech exempts a newspaper from a libel action brought by a public official unless the official proved that the statement was made with actual malice).

⁹⁹ *Hurley*, 515 U.S. at 570; *see, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (noting that cable programmers and operators are entitled to the protection of the speech and press provisions of the First Amendment).

¹⁰⁰ Even the *Dale* majority acknowledged this departure, noting that “[i]n *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers.” *Dale*, 530 U.S. at 659.

¹⁰¹ *Hurley*, 515 U.S. at 571–80.

¹⁰² *Id.* at 572–73.

¹⁰³ *Id.* at 572 (“[The Massachusetts law] does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade.”). Rather, the Court held, “the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.” *Id.*

compelling state interest. This section briefly reviews each stage and concludes with a discussion of *Hurley*'s distinct place in associational jurisprudence.

First, the *Roberts* trilogy provides clues as to the types of organizations that engage in expression protected by the First Amendment. In *Roberts*, for example, the Court found that the Jaycees, a nonprofit corporation established to promote and foster the growth and development of young men's civic organizations, engaged in a form of expression sufficient to invoke the right of expressive association.¹⁰⁴ Similarly, the *Duarte* Court found that Rotary International, also a nonprofit corporation founded to provide humanitarian services and build world peace, engaged in a form of expression safeguarded under the First Amendment.¹⁰⁵ The *Roberts* trilogy thus suggests that organizations need not engage in advocacy-related activity to fall within the ambit of expressive association.¹⁰⁶

Second, the *Roberts* trilogy provides insight into the degree of state interference necessary to violate the First Amendment.¹⁰⁷ The Court in both *Roberts* and *Duarte*, for example, required a "significant" and "serious" state burden on an organization's "shared" expressive purpose to constitute unlawful infringement.¹⁰⁸ In application, this standard has presented substantial hurdles for organizations seeking to invoke the protection of expressive association.¹⁰⁹ Such hurdles are perhaps no better illustrated than in the fact that, until *Dale*, the Court had "never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."¹¹⁰ Indeed, although the Court's unwillingness to invalidate the anti-discrimination statutes in *Roberts* and *Duarte* was additionally attributable to an overriding state interest in eradicating gender discrimination, both decisions observed a lack of "significant" state infringement in the first place.¹¹¹

Third, the *Roberts* trilogy provides examples of statutes that serve compelling

¹⁰⁴ *Roberts*, 468 U.S. at 626–27 (noting that the Jaycees' "civic, charitable, lobbying, fundraising, and other activities" were adequate to invoke the First Amendment protection).

¹⁰⁵ *Duarte*, 481 U.S. at 548 (holding that the "variety of commendable service activities" in which Rotary International engages is sufficient to invoke the First Amendment).

¹⁰⁶ See, e.g., *Duarte*, 481 U.S. at 548; *Roberts*, 468 U.S. at 626–27.

¹⁰⁷ See, e.g., *New York State Club*, 487 U.S. at 13; *Duarte*, 481 U.S. at 548; *Roberts*, 468 U.S. at 627.

¹⁰⁸ *Duarte*, 481 U.S. at 548; *Roberts*, 468 U.S. at 622, 626–27.

¹⁰⁹ See, e.g., *New York State Club*, 487 U.S. at 13; *Dallas v. Stanglin*, 490 U.S. 19, 28 (1989) (upholding an ordinance restricting admission to certain dance halls to persons between the ages of fourteen and eighteen). *But see* *Keller v. State Bar of California*, 496 U.S. 1, 11 (1990) (holding that a bar association may not constitutionally use compulsory dues to finance political and ideological causes).

¹¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 679 (2000) (Stevens, J., dissenting).

¹¹¹ See, e.g., *Duarte*, 481 U.S. at 548 (concluding that the inclusion of women did not "affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts*, 468 U.S. at 627 (asserting that the statute "require[d] no change in the Jaycees' creed of promoting the interests of young men, and it impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members").

state interests, unrelated to the suppression of ideas, that cannot be achieved through less restrictive means.¹¹² In *Roberts* and *Duarte*, for example, the Court held that statutes prohibiting the discrimination of women serve a compelling state interest sufficient to override interference with an organization's expression.¹¹³ More generally, these cases indicate that the Court does not assess whether anti-discrimination statutes are justified by a compelling state interest based on whether the protected citizens fall within a "suspect classification" under the Equal Protection Clause of the Fourteenth Amendment.¹¹⁴ Consequently, given "the State's usual power . . . when a legislature has reason to believe that a given group is the target of discrimination," the *Roberts* trilogy suggested a promising future for states' ability to protect a wide range of citizens from invidious discrimination.¹¹⁵

In theory, *Hurley* did little to compromise this future.¹¹⁶ Although the decision limited the states' authority to suppress pure speech, its analysis appeared inapplicable in determining the states' ability to prevent identity-based membership discrimination.¹¹⁷ To the contrary, the *Hurley* Court noted that the Massachusetts statute "had been applied in a peculiar way" to directly interfere with the private organizers' pure speech, thereby requiring departure from expressive association analysis.¹¹⁸

III. APPLICATION: THE DALE MISTAKE

If the *Roberts* trilogy was a step forward in states' ability to prevent invidious discrimination, *Boy Scouts of America v. Dale*¹¹⁹ was a giant leap backward. Yet standing alone, *Dale*'s limitation of states' civil rights authority does little to undermine its legitimacy.¹²⁰ Indeed, the examination of judicial decisions is often

¹¹² See, e.g., *New York State Club*, 487 U.S. at 14 n.5; *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 624.

¹¹³ See, e.g., *Duarte*, 481 U.S. at 549 ("Even if the . . . Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Roberts*, 468 U.S. at 623 ("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 the male members' associational freedoms.").

¹¹⁴ In *Craig v. Boren*, the Court held that women are not a "suspect class" for purposes of the Fourteenth Amendment. Rather, gender classifications must only serve an important governmental objective and substantially relate to that objective to withstand constitutional challenge. 429 U.S. 190, 199 (1976).

¹¹⁵ *Hurley*, 515 U.S. at 572.

¹¹⁶ Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 LAW & SEX. 163, 192 (2000) (describing *Hurley* as "a case that was not primarily understood by the Court as a free-association case").

¹¹⁷ *Id.*

¹¹⁸ *Hurley*, 515 U.S. at 572 ("In the case before us, . . . the Massachusetts law has been applied in a peculiar way.").

¹¹⁹ 530 U.S. 640 (2000).

¹²⁰ To the contrary, many restrictions on states' civil rights authority are duly justified, such

better conducted by scrutinizing analysis rather than by rendering result-based policy conclusions. To that end, this section examines the Court's analysis in *Dale*.

A. *Parties to the Litigation*

Perhaps no category of appellate jurisprudence is more dependent on fact-based analysis than cases involving the First Amendment.¹²¹ Such decisions are often “case[s] where the ultimate conclusions of law are virtually inseparable from findings of fact.”¹²² A firm understanding of *Dale* thus requires a brief background on the BSA and James Dale.

1. *The Boy Scouts of America*

The BSA is a private, recreational organization comprised of more than four million youth and one million adults.¹²³ With ninety million members since its inception in 1910, the organization is “the largest youth movement the free world has ever seen.”¹²⁴ This inclusiveness is fostered by a number of admission policies, not the least of which is that “neither [the federal] charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.”¹²⁵ In addition, the BSA strives for a “representative membership” that “reflects proportionately the characteristics of the boy population of its service area.”¹²⁶

Although the BSA is highly centralized at the national level, its infrastructure partitions into subdivisions that “own” their troops and are annually chartered.¹²⁷ This local ownership under a corporate name effectively creates a franchise structure, providing for a unique relationship with local governments, communities, and religious organizations.¹²⁸ The BSA, for example, “receives a

as the exemption of small, private clubs from anti-discrimination statutes. *See Burns, supra* note 40.

¹²¹ *Dale*, 530 U.S. at 647.

¹²² *Id.* at 648; *Hurley*, 515 U.S. at 567 (“[T]he nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole . . . [and] requires us to ‘review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts . . .’”) (quoting *Fiske v. Kansas*, 272 U.S. 380, 385–86 (1927) (citation omitted)).

¹²³ Brief for Respondent at 1, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Dale*, 530 U.S. at 666 (Stevens, J., dissenting).

¹²⁷ Respondent’s Brief at 1–2, *Dale* (No. 99-699); *Dale*, 530 U.S. at 666.

¹²⁸ *Id.* “In New Jersey alone, . . . troops were sponsored and owned by over 600 government agencies or organizations operating under state aegis, including 15 city governments, 92 law enforcement agencies, 191 public schools, 281 school parent-teacher associations and groups, 21 boards of education, 6 Army National Guard units, 4 Navy units, 1 Coast Guard unit, 2 Disabled Veterans units, 3 Air Force units, 10 Army units, and 132 fire

wide range of special privileges and benefits from federal and state government, such as a federal charter, favorable tax treatment, [and] access to facilities and services.¹²⁹ Furthermore, the BSA recognizes a quarter of its chartered institutions as public education organizations.¹³⁰

Various rules governing the BSA illustrate its pluralistic disposition with respect to religious and sexual issues.¹³¹ The organization's bylaws, for example, describe the BSA as "absolutely nonsectarian in its attitude toward . . . religious training."¹³² Consistent with this notion, the BSA does not purport to maintain views regarding religious practices or duties.¹³³ In addition, the organization specifically requires members to "learn about sex and family life from their parents, consistent with their spiritual beliefs."¹³⁴ Nothing in any distributed BSA material expresses its position on sexual matters.¹³⁵

2. James Dale

James Dale began scouting at the age of eight and officially joined the BSA three years later.¹³⁶ He remained a Scout until he turned eighteen, earning admission to the "Order of the Arrow," an honor established to reward those "who best exemplify the Scout Oath and Law in their daily lives," and the rank of "Eagle Scout," a distinction awarded to only three percent of all members.¹³⁷ During that time, Dale held various youth leadership positions and was asked by organization officials to become an Assistant Scoutmaster upon his eighteenth birthday.¹³⁸ Indeed, "[b]y all accounts, Dale was an exemplary Scout."¹³⁹

At age nineteen, Dale left home to attend Rutgers University, where he first acknowledged himself as gay.¹⁴⁰ His sexual identity was thereafter exposed in a

departments." *Id.* at 2.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 2. Moreover, public schools permit the BSA special access to recruit in classrooms and on school grounds. The BSA guidebook urges school coordinators "to give a 'personal invitation to every boy in school to join scouting,' and exhorts the 'classroom presentation coordinator' to 'band every boy, tag every boy, stick every boy' to reach the BSA's ultimate goal: 'Every classroom, every boy.'" *Id.*

¹³¹ *Id.* at 3.

¹³² *Dale*, 530 U.S. at 670 (Stevens, J., dissenting).

¹³³ Respondent's Brief at 3, *Dale* (No. 99-699) ("No troop may require its members to hold any particular religious belief or participate in any particular religious ceremony.").

¹³⁴ *Id.*

¹³⁵ *Dale*, 530 U.S. at 668-69 (Stevens, J., dissenting). Indeed, "[a]ccording to strict written policy, adult leaders are not to discuss sex with their boys, not even to answer questions." David France, *Struggle for the Soul of Scouting*, NEWSWEEK, August 6, 2001, at 44, 48.

¹³⁶ *Dale*, 530 U.S. at 644.

¹³⁷ *Id.* at 665 (Stevens, J., dissenting) (noting that Dale also earned twenty-five merit badges and gave more than twelve years of active and honored participation).

¹³⁸ *Id.*

¹³⁹ *Id.* at 644.

¹⁴⁰ *Id.* at 645.

newspaper article covering a gay-lesbian conference at Rutgers.¹⁴¹ Although the article made no mention of his involvement with the BSA, Dale's membership was rescinded as a result of his identification as a homosexual. Dale sued, alleging the revocation of his membership violated New Jersey's public accommodation statute.¹⁴²

B. *The Rationale of the Dale Court*

The New Jersey Superior Court's Chancery Division entered summary judgment for the BSA on the basis that the organization was not a "place of public accommodation."¹⁴³ The New Jersey Superior Court's Appellate Division reversed, concluding that the BSA constituted a public accommodation to which the statute was applicable, and the state supreme court affirmed.¹⁴⁴ On certiorari, the United States Supreme Court declined to question either the state court's public accommodation¹⁴⁵ or intimate association ruling,¹⁴⁶ instead focusing

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* The New Jersey Supreme Court denied both the BSA's claim to intimate association and expressive association. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1242–43 (N.J. 1999). Citing *Duarte*, the court held that the BSA is not "sufficiently personal or private to warrant constitutional protection" under the freedom of intimate association" because the organization was nonselective, large in size, and in the practice of inviting nonmembers to attend meetings. *Id.* at 1221 (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987)). In addition, the court noted that although the "Boy Scouts expresse[d] a belief in moral values and use[d] its activities to encourage the moral development of its members," it was "not persuaded . . . that a 'shared goal[]' of Boy Scout members [was] to associate in order to preserve the view that homosexuality is immoral." *Id.* at 1223–24. Accordingly, the court denied the organization's expressive association claim, noting that Dale's "inclusion would not 'affect in any significant way [the BSA] existing members' ability to carry out their various purposes.'" *Id.* at 1225 (quoting *Duarte*, 481 U.S. at 548). Even presuming, arguendo, that the statute significantly infringed the BSA's right to expressive association, the court held that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society." *Id.* at 1227–28.

In concurrence, Justice Handler "reminded us of both how far we have come in combating invidious discrimination and how far we still have to go." Randy M. Mastro, *A Tribute to Justice Alan B. Handler: Justice Handler's Concurrence in Dale v. Boy Scouts of America: A Morality Tale*, 30 SETON HALL L. REV. 741, 742 (2000). Handler noted:

One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society. Like stereotypes about an individual based on sex or race, similar assumptions about a lesbian or gay man are false and unfounded, and reveal nothing about that individual's moral character, or any other aspect of his or her personality

Dale, 734 A.2d at 1242–43 (Handler, J., concurring) (citation omitted).

¹⁴⁵ *Id.* The *Dale* Court addressed whether the BSA constituted a place of public accommodation in passing, noting in a footnote that "[f]our State Supreme Courts and one

United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation” and that “[n]o federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result.” *Dale*, 530 U.S. at 657 n.3. The absence of further analysis likely derives from the Court’s recognition that the ultimate interpretation of New Jersey’s public accommodation statute is that of the state supreme court. The Court’s account of cases involving public accommodation statutes vis-à-vis the BSA, however, failed to reference other contexts in which the BSA has, indeed, been found to constitute a place of public accommodation. Title II of the Civil Rights Act of 1964, for example, employs the term “place of public accommodation.” 42 U.S.C. § 2000(a) (1994). The leading case construing Title II in this regard is the Seventh Circuit case, *Welsh v. Boy Scouts of America*, in which the court concluded that the BSA constituted a “place of public accommodation” for the purposes of Title II of the 1964 Civil Rights Act. 993 F.2d 1267, 1278 (7th Cir. 1993). Title II cases, in turn, have been held to provide guidance on the manner in which courts should interpret Title III of the Americans with Disabilities Act. 42 U.S.C. § 12181–12189. *See, e.g.*, *Bowers v. NCAA*, 9 F. Supp. 2d 460, 484 (D.N.J. 1998) (stating that some courts have looked to Title II for guidance in interpreting Title III); *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (noting that Title II decisions “provide instructive analysis in Title III ADA cases”); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (employing Title II “for instructive analysis” of the plaintiff’s Title III action). Indeed, “if Title III does not cover the Boy Scouts, the organization could flatly exclude all boys with a disability, a history of disability, or who are regarded as having a disability. An aggrieved disabled boy attempting to integrate himself into the social mainstream of American boyhood would be prevented from doing so and would have no remedy in the courts.” Matthew A. Stowe, Note, *Interpreting “Place of Public Accommodation” Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 321 (2000) (arguing that the “legislative history of the ADA, as evidence of Congress’s intent, weigh[s] heavily in favor of a finding that membership organizations without close ties to a structural facility, like the Boy Scouts, either constitute ‘places of public accommodation’ or operate ‘places of public accommodation’”). *But see* Martha Minow, Lecture, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1081 (2000) (arguing that such “resulting reforms breached the public/private line and interfered, wrongly, with private activity in the name of public norms”).

Furthermore, the New Jersey Supreme Court’s determination that the BSA was a “place of public accommodation” was based on sound precedent. The court noted, for example, that the statute’s applicability had historically been interpreted broadly, evinced by the state legislature’s amendment to the 1966 statute. *Dale*, 734 A.2d at 1210; *see, e.g.*, *Fraser v. Robin Dee Day Camp*, 210 A.2d 208 (N.J. 1965) (setting forth the rationale that the legislature later codified in the 1966 Amendment). Moreover, the court’s determination that a “place of public accommodation” is not limited to a “place” was based on established case law. *Dale*, 734 A.2d at 1209; *see, e.g.*, *United States Jaycees v. McClure*, 305 N.W.2d 764, 773 (Minn. 1981) (approving a flexible construction of the term “place”); *Nat’l Org. of Women v. Little League Baseball, Inc.*, 338 A.2d 198 (N.J. 1974) (affirming that “the statutory noun ‘place’ . . . is a term of convenience, not of limitation”); *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1204 (N.Y. 1983) (holding that a “place of public accommodation” need not be a fixed location). Having determined that the statute’s applicability was not limited to a “place,” the court addressed whether the BSA was a “public accommodation” by inquiring “whether the entity . . . engages in broad public solicitation, whether it maintains close relationships with the government or other public accommodations, or whether it is similar to enumerated or other previously recognized public accommodations.” *Dale*, 734 A.2d at 1210. The court concluded that “[g]iven Boy Scouts’ public solicitation

exclusively on the BSA's allegation that the forced inclusion of Dale would constitute significant state infringement on the organization's ability to engage in anti-gay expression.¹⁴⁷

In an opinion by Chief Justice Rehnquist, the Court addressed the BSA's expressive association defense under the analytic framework set forth in the *Roberts* trilogy. Applying the first prong of the framework, the Court inquired whether the "group . . . engage[d] in some form of expression, whether it be public or private."¹⁴⁸ Reviewing the Scout Oath and Law, the Court found that "the general mission of the Boy Scouts is clear: 'To instill values in young people.'"¹⁴⁹ The Court concluded that an association seeking to transmit such a system of values undisputedly engaged in expression.¹⁵⁰

Given that the BSA engaged in expressive activity, the Court addressed the secondary issue of whether the New Jersey statute significantly affected the organization's ability to advocate that expression.¹⁵¹ This consideration required the Court to explore the nature of the BSA's view of homosexuality.¹⁵² Consulting the BSA brief, the Court observed that the organization "teaches that homosexual conduct is not morally straight" and declared that "[w]e accept the Boy Scouts' assertion . . . [and] need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."¹⁵³ Nevertheless, the

activities, and considering its close relationship with governmental entities, it is not surprising that Boy Scouts resembles many of the recognized and enumerated places of public accommodation." *Id.* at 1213.

¹⁴⁶The absence of an intimate association analysis from the majority's opinion likely reflects the Court's view that such claims brought by large organizations are effectively futile. *See, e.g.,* New York State Club Ass'n. v. New York, 487 U.S. 1, 12 (1988) (holding that the statute's regular meal service and nonmember payment requirements were "at least as significant in defining the nonprivate nature of these associations" as the characteristics of the organizations in *Roberts* and *Duarte*); *Duarte*, 481 U.S. at 548 (concluding that Rotary International was "not the kind of intimate or private relation that warrants constitutional protection" in its size, purpose, and selectivity); *Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984) (determining that the Jaycees lacked the distinctive characteristics sufficient to invoke First Amendment protection). Perhaps most telling of the Court's view in this regard was the categorical rejection of such claims brought by large organizations in Justice O'Connor's concurrence in *Roberts*. 468 U.S. at 631 (O'Connor, J., concurring) ("[T]he Jaycees cannot claim a right of association deriving from this Court's cases concerning 'marriage, procreation, contraception, family relationships, and child rearing and education.' . . . Whatever the precise scope of the rights recognized in such cases, they do not encompass associational rights of a 295,000-member organization . . .") (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976) (citation omitted)).

¹⁴⁷*Dale*, 530 U.S. at 646–63.

¹⁴⁸*Id.* at 648.

¹⁴⁹*Id.* at 649.

¹⁵⁰*Id.* at 650 (citing *Roberts* to support the proposition that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity").

¹⁵¹*Id.*

¹⁵²*Id.* Significantly, the *Dale* Court noted that the examination of the BSA's expressive content required inquiry only "to a limited extent." *Id.*

¹⁵³*Id.* at 651. By contrast, the Girl Scouts of America (GSA) "lets each of the 317 local

Court accepted the terms “morally straight” and “clean” in the Scout Oath and Law as “written evidence of the Boy Scouts’ viewpoint, . . . if only on the question of the sincerity of the professed beliefs.”¹⁵⁴ Although noting that different people would attribute very different meanings to “morally straight” and “clean,” the Court in no uncertain terms accepted the BSA’s contention that homosexual conduct is contrary to the values embodied in such language.¹⁵⁵ Citing *Hurley*, the Court then concluded that “[a]s the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.”¹⁵⁶

In the final stage of the analysis, the Court held that the substantial infringement created by Dale’s presence was not justified by a compelling state interest.¹⁵⁷ Distinguishing the compelling interests found in the *Roberts* trilogy, the Court noted that the state action in those cases did “not materially interfere with the ideas that the organization sought to express.”¹⁵⁸ Absent from the divided Court’s opinion,¹⁵⁹ however, was any reference to whether the protection of

councils decide [discrimination policies] for itself.” Peg Tyre, *For the Girls, a Different Policy*, NEWSWEEK, August 6, 2001, at 51, 51. Nevertheless, “the [GSA’s] national policy claims to prohibit discrimination against homosexuals,” although “local councils are not automatically dechartered if they do.” *Id.*

¹⁵⁴ *Dale*, 530 U.S. at 651.

¹⁵⁵ *Id.* Although the plain language of *Dale* fails to explicitly regulate public morality, “[o]ne must question . . . whether the Court would have reached the same result in *Dale* if the Boy Scouts held the belief that only Caucasians were ‘morally straight.’” J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1545 (2000). Presuming the Court would not defer to an organization’s contention that only Caucasians were “morally straight,” its decision to defer to the BSA’s claim that homosexuals were not “morally straight” is a selective determination. The Court’s exercise of such selectivity, in turn, effectively adopts the organization’s views to which it grants deference.

¹⁵⁶ *Dale*, 530 U.S. at 654. The Court also stated that “[a]lthough we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here.” *Id.* at 659.

¹⁵⁷ *Id.* at 658–59.

¹⁵⁸ *Id.* at 658.

¹⁵⁹ One critic has suggested that Justice Stevens, who wrote the dissent in *Dale*, “began with a majority . . . but was forced to turn it into a dissent when he lost one vote shortly before the end of [the] Term.” The evidence consisted of five factors:

- (1) [A]lthough each Justice ordinarily has at least one majority opinion per sitting, Justice Stevens had no majority opinion for the April 2000 sitting (the only such instance all Term);
- (2) Justice Stevens’s dissent looks very much like a hastily-converted majority opinion, with a long factual section and relatively few references to the majority opinion;
- (3) the Chief already had the Dickerson majority for that month, and it would have been unusual to keep two important opinions from one sitting;
- (4) the syllabus to the Chief’s opinion is a one-paragraph drill, lacking the usual careful substructure, suggesting it was done in a rush

homosexuals constituted a lesser state interest than the “compelling interest” that *Roberts* and *Duarte* found in protecting women.¹⁶⁰

C. *The Dale Approach: A Critique*

Dale marked the first time the Court recognized the right to discriminate as a component of expressive association.¹⁶¹ Given the precedent set forth by the *Roberts* trilogy, however, *Dale* raises concerns at virtually every stage of its analysis.¹⁶² This section argues the *Dale* Court erred in concluding that (1) the BSA maintained an anti-gay expressive message, (2) Dale’s presence in the BSA infringed upon that message, and (3) such infringement was not justified by a compelling state interest.

1. *The Enigmatic Anti-Gay Message in “Morally Straight” and “Clean”*

The *Dale* Court grounded its determination that the BSA engaged in anti-gay expression on the group’s contention that homosexual conduct is inconsistent with the terms “morally straight” and “clean.”¹⁶³ This contention, however, is contradicted by the plain language of the Scout Handbook, which defines “morally straight”:

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

4 GREEN BAG 2d 27, 31 (2000).

¹⁶⁰ That is, the Court’s basis for rejecting the contention that the New Jersey statute served a compelling state interest was *not* that the statutes in *Roberts* and *Duarte* protected women, subject to intermediate scrutiny under the Fourteenth Amendment, whereas the statute in *Dale* protected homosexuals, subject to a mere rationality standard.

¹⁶¹ As Professor Carrington has noted, the Court has never before recognized “a right to associate for the purpose of achieving discrimination against embattled groups.” Carrington, *supra* note 1, at 1188. Moreover, the “New Jersey law that the Court invalidated can hardly be viewed as an expression of majoritarian tyranny indifferent to the interest and welfare of a beleaguered minority represented by the Scouts. The Scouts have full recourse to the political process to correct the problem if indeed the people of New Jersey perceive that there is one.” *Id.*; see also *Dale*, 530 U.S. at 679 (“[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State’s antidiscrimination law.”) (Stevens, J., dissenting).

¹⁶² Larry Cata Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 121 (2000) (stating that *Dale* provides “a stunning illustration of the decadent and baroque qualities of constitutional adjudication that is slowly sapping the vigor of juridical authority to interpret our ‘Basic Law’”); Carrington, *supra* note 1 (“[T]here is unseemliness in the Court’s fashioning a constitutional right of the Boy Scouts to exclude homosexual scoutmasters. . . . To find this restraint in the text of the First Amendment is more than a stretch . . .”).

¹⁶³ See *supra* notes 153–56 and accompanying text.

*become virtuous and self-reliant.*¹⁶⁴

The Handbook elaborates on the meaning of the phrase:

In any consideration of moral fitness, a key word has to be “courage.” A boy’s courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.¹⁶⁵

Thus, neither the plain language of “morally straight” nor its definition in the Scout Handbook references the organization’s view on homosexual conduct or sexuality in general. To the contrary, the Handbook’s definition further reveals the BSA’s pluralistic and open-minded nature in its suggestion that members be “honest and open”—a virtue that when “courageously” displayed by James Dale induced the very organization that encouraged such truthfulness and courage to exclude him.

Similarly, the Scout Handbook’s reference to the term “clean” lacks any expressive or implicit message regarding homosexuality. The Handbook explains:

A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean. . . . Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.*¹⁶⁶

Neither the BSA’s mission statement nor its official membership policy reflected further elaboration on the meaning of “clean.” Indeed, as Justice Stevens noted in dissent, “[i]t is plain as the light of day that . . . ‘clean’ [does not] say[] the slightest thing about homosexuality.”¹⁶⁷

Moreover, although the Rehnquist majority attempted to disconnect itself from such an attenuated inference of the terms “morally straight” and “clean” by deferring to the BSA’s interpretation,¹⁶⁸ such a judicial approach is problematic in at least two respects. First, this ostensible display of judicial restraint encourages organizational leaders to include ambiguous language in their charters and handbooks.¹⁶⁹ This language may then be broadly interpreted to comprehend a

¹⁶⁴ BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK 551 (10th ed. 1990).

¹⁶⁵ *Id.* at 239–40.

¹⁶⁶ *Id.* at 561.

¹⁶⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 668 (2000) (Stevens, J., dissenting).

¹⁶⁸ *Id.* at 661 (“We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong.”).

¹⁶⁹ As Justice Stevens noted in dissent:

seemingly infinite number of meanings, thereby allowing organizations to insulate themselves from anti-discrimination laws. The *Dale* dissent recognized this precise concern, noting that “[i]f this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate . . . and sham claims that are simply attempts to insulate nonexpressive private discrimination”¹⁷⁰

Second, the *Dale* Court’s deferential approach increases the danger of organizational leaders¹⁷¹ suggesting expressive values that, in fact, differ from those of its members.¹⁷² Although “the First Amendment . . . does not require that

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. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, “we are obligated to independently review the factual record.” It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be “limited,” because “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”

Id. at 686 (citations omitted).

¹⁷⁰ *Id.* at 687.

¹⁷¹ The religious and ideological composition of the BSA leadership has come under close scrutiny in the wake of *Dale*:

[O]bservers say Mormons exercise unparalleled clout over the national board, which for years was sprinkled with top executives from Eastern firms and now attracts mostly conservative civil leaders tied to the churches that sponsor troops. Before the Supreme Court ruling the Salt Lake City-based church threatened to break away from the fold if forced to tolerate homosexuals. Such a move would devastate scouting, a ranking leader says. “There is unadulterated fear that they’re going to bail out, that they’re going to start their own program,” says the Scout leader, who requested anonymity. “The Mormons have all the cards.”

France, *supra* note 135, at 48–49.

¹⁷² Numerous members of the BSA, for example, testified that they were unaware of the organization’s purported anti-gay expression. *See, e.g., Dale*, 530 U.S. at 675–76 n.7 (Stevens, J., dissenting). An ex-Boy Scout whose children were young Scouts and was himself an assistant and a merit badge counselor stated, for example, that “I never heard and am not aware of any discussion about homosexuality that occurred during any Scouting meeting or function Prior to September 1991, I never heard any mention whatsoever of homosexuality during any Scouting function.” *Id.*; *see also* Backer, *supra* note 162, at 140 (“It is hard for anyone with a memory to think of the Boy Scouts of America as an organization whose expressive purpose was to stamp out homosexuality.”).

Moreover, numerous Scouts were not only unaware of the BSA’s stance on homosexuals, but affirmatively protested against it. Ninety-three boys in the Montclair, New Jersey Cub Scout Pack, for example, signed a petition against the anti-gay rule. Claudia Kolker, *Boy Scouts Pledge to Persevere Opposition to Ban on Gays*, L.A. TIMES, Nov. 14, 2000, at A2. Similarly, “[n]ot everyone on the Yankee Boy Scouts Council board of directors agreed with the national policy.” Richard Weizel, *In Hopes of Reviving Donations, A Pamphlet*, N.Y. TIMES, Feb. 11, 2001, at 14. Attorney John Andres, who assisted in drafting a local BSA position paper, also

every member of a group agree on every issue in order for the group's policy to be 'expressive association,'"¹⁷³ *Roberts* dictates that state interference is only unconstitutional when it infringes upon a group's "collective effort on behalf of [its] shared goals."¹⁷⁴ At best, "there is no indication of any shared goal of teaching that homosexuality is incompatible with being 'morally straight' and 'clean.'"¹⁷⁵ At worst, the anti-gay message suggested by BSA officials is at odds

attempted to convince the national group to change its policy. *Id.*

The backlash to the BSA's anti-gay campaign intensified in the month that followed *Dale*. The front-page of *The New York Times* reported that "corporate and governmental support for the organization has slipped markedly." Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1; see also Andrew Jacobs, *The Supreme Court: The Reaction; Victory Has Consequences of Its Own*, N.Y. TIMES, June 29, 2000, at A28 (noting that the "aggressive legal campaign to exclude gay leaders has provoked disenchantment from religious groups, school boards and parent volunteers around the country"). *The Los Angeles Times* also ran a front-page story on the diminishing support for the BSA, noting that "the national organization has endured a forest fire of protests from cities, charities, even some Scout troops themselves." Kolker, *supra*. Additionally, *The Wall Street Journal* reported that "[s]ome of the biggest backers of the Boy Scouts of America are withdrawing their support from the group following [the] . . . wake of a Supreme Court ruling that upholds their longtime policy of excluding gay scouts. At least three big corporate sponsors—including Chase Manhattan Corp. and Knight Ridder Inc.—are pulling or considering cutting . . . support." Daniel Costello, *Some Backers Pull Boy Scouts' Funding after High Court's Ruling on Gay Scouts*, WALL ST. J., Aug. 24, 2000, at B7. Most recently, Oscar-winning producer and director Steven Spielberg, who gained the BSA's highest honor of Eagle Scout, resigned from his position on the advisory board after ten years of service, stating "[t]he last few years in Scouting have deeply saddened me to see the Boy Scouts of America activity and publicly participating in discrimination." *Spielberg Quits Scout Post over Anti-Gay Policy*, L.A. TIMES, April 17, 2001, at B2.

In addition, a wide variety of public, corporate, and religious entities that once affiliated themselves with the BSA joined a "growing effort to block local chapters from meeting in places like public schools and state campgrounds . . ." Zernike, *supra*, at A16. "[A]t least 4,418 schools nationwide have ended preferential relationships with the Scouts," France, *supra* note 135, at 47, and many major cities, such as Chicago and San Francisco, no longer allow BSA programs during school hours. *Id.* at A1 (correction article on September 6, 2000). Many corporations, including Textron, Chase Manhattan Bank, and the United Way, have withdrawn millions of dollars otherwise donated to local and national scouting groups nationwide. *Id.*; France, *supra* note 135, at 47 ("About 44 of the most affluent chapters of the United Way—one of the scouting's biggest funders—have blocked additional support . . ."); see *id.* ("Levi Strauss, Wells Fargo, Fleet Bank and CVS, along with the Philadelphia Foundation and Communications Workers of America, have taken steps to distance themselves [from the BSA]."). Finally, numerous religious leaders have requested that parents withdraw their children from the BSA, arguing that the BSA's purported views are "incompatible with [the] consistent belief that every individual—regardless of his or her sexual orientation—is created in the image of God and is deserving of equal treatment." Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts*, N.Y. TIMES, Jan. 10, 2001, at A12; see France, *supra* note 135, at 46 ("[T]he United Church of Christ, along with Baptist and Episcopal congregations, have asked the Scouts to reconsider.").

¹⁷³ *Dale*, 530 U.S. at 655.

¹⁷⁴ *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added).

¹⁷⁵ *Dale*, 530 U.S. at 675 (Stevens, J., dissenting).

with the group's shared goals of diversity and non-selectivity.

2. The "Significant Burden" of Dale's Presence

Given the BSA's contention that homosexuality is inconsistent with the organization's expressive activities, the Court concluded that Dale's continued membership significantly infringed the members' ability to carry out those activities.¹⁷⁶ Prior cases had suggested, however, that the mere presence of an unwanted individual in an organization engaging in non-advocacy related activity failed to constitute such infringement.¹⁷⁷ In *Roberts*, for example, the Court concluded that the Minnesota statute "require[d] no change in the Jaycees' creed of promoting the interests of young men, and it impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."¹⁷⁸ In addition, the *Duarte* Court determined that the California statute did "not require the clubs to abandon . . . their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community."¹⁷⁹

Similarly, Dale's continued membership in the BSA would fail to significantly affect the organization's expressive purposes. The BSA neither instructs scouts to engage in anti-gay expression nor encourages its scoutmasters to convey such views.¹⁸⁰ More importantly, the record was void of any evidence that Dale had in the past, or would in the future, use his leadership position as a pulpit for the promulgation of homosexual ideas.¹⁸¹ Indeed, neither the article identifying Dale as the co-president of the Gay-Lesbian Alliance nor the other extracurricular activities in which Dale participated associated him with the

¹⁷⁶ See *supra* notes 154–59.

¹⁷⁷ See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (concluding that the inclusion of women did not "affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts*, 468 U.S. at 627. Note that the *Roberts* trilogy and *Dale* are not distinguishable on the basis that the trilogy involved the exclusion of members, whereas *Dale* involved the exclusion of an organization leader. Indeed, "[t]he duties of neither an assistant scoutmaster nor a Boy Scout member include teaching, learning, or discussing the topic of homosexuality." 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, 985 (2000). Moreover, the BSA acknowledged that the terms "member" and "leader" are "interchangeable" for all adults affiliated with the organization. As a result, "if the Boy Scouts of America can be required to readmit Dale as a member, similarly forcing the Boy Scouts of America to reappoint Dale to his assistant scoutmaster position does not violate the freedom of association." *Id.* at 986.

¹⁷⁸ *Roberts*, 468 U.S. at 627.

¹⁷⁹ *Duarte*, 481 U.S. at 548.

¹⁸⁰ See *supra* notes 133–37.

¹⁸¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 689 (2000) (Stevens, J., dissenting).

BSA.¹⁸²

Furthermore, the *Dale* Court's analogy to *Hurley* renders its holding even more tenuous.¹⁸³ By the Court's own admission, *Hurley* held that the Massachusetts statute's "peculiar" application interfered with the parade sponsors' pure speech rather than its right to expressive association.¹⁸⁴ As a result, the *Hurley* Court departed from the expressive association framework and more aptly addressed the state interference in the context of traditional First Amendment analysis.¹⁸⁵ *Hurley*, therefore, fails to address the identity-based discrimination at issue in *Dale*.

Moreover, a closer examination of *Hurley*, in fact, undermines the *Dale* decision. In dicta, the *Hurley* Court "distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so."¹⁸⁶ The Court noted that the latter would avoid the problematic aspects of the former given that the pure speech of the parade organizers would no longer be implicated.¹⁸⁷ *Dale*, as an individual not intending to express his sexuality in BSA activities, is thus more appropriately analogized to the individual participants than the organizational unit that marched to express their views on homosexuality.¹⁸⁸

¹⁸² *Id.*

¹⁸³ One scholar predicted *Hurley*'s faulty application before the *Dale* decision, noting that although the *Hurley* Court "implicitly de-emphasize[d] the importance of the *Roberts* approach, [*Hurley*] may have fateful implications for attempts to use antidiscrimination law to eliminate private exclusion of gays and others." Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 LAW & SEX. 163, 192 (2000).

¹⁸⁴ See *supra* note 118.

¹⁸⁵ *Id.*; Backer, *supra* note 162. Backer notes that the *Dale* majority "stretches to make new constitutional doctrine by the process of analogy. This time, the object was to stretch the relevance and utility of *Hurley* . . ." *Id.* at 136.

¹⁸⁶ *Dale*, 530 U.S. at 694 (Stevens, J., dissenting) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995)).

¹⁸⁷ More precisely, the GLIB's views "would likely be perceived" as the parade organizers' own speech, whereas the individual marchers posed no such threat when they participated separately. *Hurley*, 515 U.S. at 575.

¹⁸⁸ Justice Souter stated at oral argument that "[t]he problem in simply drawing a parallel to *Hurley* is that we're not at the point where anyone is using the Boy Scouts, or proposing to use the Boy Scouts for expression." Appellant's Oral Argument, Transcript at 22–25, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Although counsel for the BSA replied that "he put a banner around his neck when he . . . got himself into the newspaper," this contention disregards the fact that, under the same theory, individual gay and lesbian marchers in the St. Patrick's Day parade would have also put a banner around their necks—a proposition the *Hurley* Court flatly rejected. *Id.*

3. *The Non-Compelling Interest of Eradicating Discrimination Based on Sexual Orientation*

In the final stage of its analysis, the Court concluded that the substantial infringement created by Dale's presence was not outweighed by a compelling state interest.¹⁸⁹ Although this consideration entails a balance between the state interest in eradicating discrimination and the severity of the infringement upon the organization's expression,¹⁹⁰ the *Dale* Court focused exclusively on the degree of state infringement on the BSA's expression. As a result, the Court's basis for rejecting the contention that the New Jersey statute served a compelling state interest was *not* that, unlike the protection of women in *Roberts* and *Duarte*, the statute in *Dale* protected homosexuals.¹⁹¹ Rather, the *Dale* Court determined that the application of the statute in *Dale* "materially interfere[d] with the ideas that the organization sought to express."¹⁹²

The *Dale* Court's exclusive focus on the degree of infringement, however, effectively disregards the balancing component required in determining whether substantial infringement is outweighed by a compelling state interest. Indeed, the Court's indifference to the state interest served by the statute in *Dale* is at odds with *Roberts* and *Duarte*, in which public accommodation statutes were found to "plainly serve[] compelling state interests of the highest order."¹⁹³ The Court noted in those decisions that "acts 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 . . ."¹⁹⁴

¹⁸⁹ See *supra* notes 159–62.

¹⁹⁰ See *supra* note 64.

¹⁹¹ Although the Court's explicit basis for rejecting New Jersey's compelling state interest argument was not the class of citizens protected by the statute, this distinction may very well have been the motivation for the Court's decision. See Jasiunas, *supra* note 155, at 1544 ("[T]he Court's reasoning is instructive as to . . . the way that the Court treats sexual orientation differently from other classes protected under anti-discrimination laws.").

¹⁹² *Dale*, 530 U.S. at 658.

¹⁹³ *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); see Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 64 (2000) (noting the potentially "puzzling and problematic" distinction between the Jaycees implicated in the *Roberts* litigation and the BSA). Moreover, the Court has expressly concluded that the protection of homosexuals against inequitable treatment falls within the states' general authority to eradicate invidious discrimination. In *Romer v. Evans*, 517 U.S. 620 (1995), for example, the Court held that "orientation antidiscrimination laws are not 'special rights' for homosexuals but are, instead, legitimate state efforts to assure GLBT people the same public space that straight people routinely enjoy." William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1410 (2000) (quoting *Romer*, 517 U.S. at 632).

¹⁹⁴ *Roberts*, 468 U.S. at 628. In addition, the New Jersey statute achieves this compelling interest through least-restrictive and content-neutral means. Indeed, the BSA made no claim to the over-inclusive nature of the statute, save for its intended prohibition of discrimination based on sexual orientation. Moreover, the Court unanimously reaffirmed that such anti-

IV. DEGENERATION OF STATES' REGULATORY AUTHORITY TO PREVENT
DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION:
THE AFTERMATH OF *DALE*

The criticisms offered in Part III raise concerns not only with respect to *Dale's* long-term stability, but also to its present-day legitimacy in authorizing the discrimination of homosexuals and suppressing the civil rights authority of state governments.¹⁹⁵ This section envisions a theoretical state of affairs in the aftermath of *Dale*, exploring both the breadth of discrimination authorized under its holding and the corresponding limitation on states' civil rights authority.¹⁹⁶ An appreciation for the severity of this limitation, however, first requires a comprehension of the states' function in undermining invidious discrimination.

A. *The States' Role in Preventing Invidious Discrimination*

The function of state governments in eradicating invidious discrimination follows two lines of interpretation. One line of interpretation contends that states assume a responsibility in falsifying stereotypes and ameliorating prejudice. The other asserts that states merely maintain the authority to take such measures if they choose to do so. Although this debate is ultimately of only modest significance for purposes of this note, the following sections address each in turn to illustrate *Dale's* limitation on states' civil rights authority under each theory.

1. *The Affirmative Responsibility of State Governments
in Ameliorating Discrimination*

Scholars and jurists alike have recognized an obligation of states in undermining invidious discrimination.¹⁹⁷ Professor William Eskridge, for example, has asserted that although "[t]he state cannot, either practically or constitutionally, require people to abandon stereotypes or prejudices, . . . state policies can contribute to or undermine this social process."¹⁹⁸ This capacity to undermine discrimination, in turn, becomes an obligation when "the state [has] pervasively contributed to [the discriminatory] status quo, with its . . . stereotypes

discrimination legislation is content-neutral and unrelated to speech in *Wisconsin v. Mitchell*, 508 U.S. 476, 484–85 (1993).

¹⁹⁵ See *supra* notes 18–25 and accompanying text.

¹⁹⁶ *Dale's* impact on states' civil rights authority has particular significance for the numerous jurisdictions that prohibit discrimination based on sexual orientation. See, e.g., CONN. GEN. STAT. ANN. § 46a-81d (West 2001); D.C. CODE ANN. § 1-2519 (2001); HAW. REV. STAT. ANN. § 368-1 (Michie 2001); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2001); MINN. STAT. ANN. § 363.03 (West 2001); N.J. STAT. ANN. § 10:5-3 (West 2001); R.I. GEN. LAWS § 11-24-2 (2001); VT. STAT. ANN. tit. 9, § 4502 (2001); WIS. STAT. ANN. § 106.54 (West 2001).

¹⁹⁷ See *infra* notes 198–203.

¹⁹⁸ Eskridge, *supra* note 193.

and prejudices.”¹⁹⁹ Under these circumstances, Eskridge contends, “even liberal conceptions of the state support an affirmative state responsibility to assure . . . people conditions under which they have a chance to falsify stereotypes and ameliorate prejudice.”²⁰⁰

In addition, the *Roberts* trilogy repeatedly suggested the affirmative duty of states in protecting the civil rights of their citizens.²⁰¹ In *Roberts*, for example, the Court held that “acts 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.”²⁰² Similarly, the *Duarte* Court found that the eradication of discrimination in places of public accommodation “plainly serves compelling state interests of the highest order.”²⁰³ The compelling state interest in assuring the equal treatment of every citizen thus implies an inherent activist approach to states’ civil rights authority.

2. *The Voluntary Authority of State Governments in Ameliorating Discrimination*

The alternative interpretation of states’ role in undermining discrimination is that of a voluntary, rather than affirmative, nature.²⁰⁴ The Constitution’s federalist approach, largely embodied in the Tenth Amendment, reserves to the states the ability to regulate solely on the basis that the regulation promotes the safety, health, or general welfare of the citizenry.²⁰⁵ Pursuant to this authority, states’ ability to enact legislation prohibiting the invidious discrimination of their citizens has been universally accepted, notwithstanding constitutional or congressional provisions to the contrary.²⁰⁶ The voluntary theory holds that states, and ultimately the electorate, are free from obligation to adopt statutory prohibitions of discrimination.

One example of a political philosophy supporting such an interpretation is Jeremy Bentham’s theory of utilitarianism.²⁰⁷ State government adherence to the utilitarian theory “favors state promotion of the good when it would help more people than it would hurt.”²⁰⁸ Thus, if a state government assumes that

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See, e.g., *New York State Club*, 487 U.S. at 14 n.5; *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 624.

²⁰² *Roberts*, 468 U.S. at 628.

²⁰³ *Id.* at 624.

²⁰⁴ The term “voluntary” in this context denotes only a non-affirmative duty of state governments to enact civil rights legislation.

²⁰⁵ U.S. CONST. amend. X.

²⁰⁶ See *id.*

²⁰⁷ See Jeremy Bentham, *Offences Against One’s Self: Paederasty* (pts. 1 & 2), reprinted in 3 J. OF HOMOSEXUALITY 389 (1978), 4 J. OF HOMOSEXUALITY 91 (1978).

²⁰⁸ Eskridge, *supra* note 193, at 1373. Eskridge similarly applied Bentham’s theory to the regulatory power of state governments in eradicating discrimination. *Id.*

heterosexuality is “better” than homosexuality, the legislature should enact anti-gay policies because “the happiness they bring to a large segment of our society outweighs the distress they cause for the smaller group of gay people.”²⁰⁹ Accordingly, Bentham’s utilitarian theory requires a voluntary interpretation of states’ civil rights authority that does not mandate the protection of minority groups.

3. *The Impact of Dale on Both the Affirmative and Voluntary Theories*

The import in distinguishing between the affirmative and voluntary theories of states’ civil rights authority lies in understanding *Dale*’s impact on both theories. On one hand, *Dale*’s impact on the affirmative duty to undermine discrimination hinders a *responsibility*. On the other, *Dale*’s impact on the mere capacity to undermine such discrimination eliminates a *choice*. The key is that *Dale*’s legalization of discrimination limits states’ civil rights authority irrespective of the debate.

B. *The Extent of Dale’s Limitation on States’ Civil Rights Authority*

The following sections generally illustrate the types of discriminatory practices seemingly permitted under *Dale*’s analytic framework through the use of two hypothetical situations. The first of these situations closely parallels the facts of *Dale*, attempting to demonstrate that even the most palpable form of discrimination authorized by the decision—discrimination based on sexual orientation—reveals a fatal defect in the *Dale* Court’s analysis. The second hypothetical explores the broad extent to which *Dale* impacts the civil rights not only of homosexuals, but of other classes of citizens subject to discrimination.

1. *Hypothetical #1: Discrimination Based on Sexual Orientation*

Evanston, Illinois, is home to a private, nonprofit organization of business men and women. Comprised of nearly one million members worldwide and located in over one hundred different countries, the organization constitutes one of the largest occupational associations in the world. Its expressive purpose, as noted in its “Manual of Procedure,” is simple: “To provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world.” Neither its board of directors nor any of its members have ever understood the organization to engage in anti-gay expression. Indeed, the organization prides itself on its wide range of personal and occupational representation.

Recently, two leaders of a local branch began excluding avowed homosexual members solely on the basis of their sexual orientation. In response, the excluded individuals filed suit against the organization, alleging a violation of the state’s

²⁰⁹ *Id.*

statutory prohibition of discrimination based on sexual orientation in places of public accommodation. The organization's board of directors, concerned with potential liability, convened to determine the most effective legal strategy. After extensive deliberation, the board concluded that the organization would affirmatively defend against the allegation on the theory that the statute violates the organization's right of expressive association by virtue of homosexual conduct being inconsistent with the values embodied in the phrase "high ethical standards," as noted in the Manual of Procedure.

a. *Application of the Dale Rationale*

In the wake of *Dale*, the organization prevails on this theory. The reviewing court, applying the first prong of the analytic framework, would determine the organization engages in sufficient expression to invoke the First Amendment given that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."²¹⁰ In conducting the second prong of the analysis, the court would also conclude that the statute significantly infringed upon this expression. Although this determination would require the reviewing court to explore the "nature of the [organization's] view of homosexuality,"²¹¹ the reviewing court "need not inquire further to determine the nature of the [organization's] expression with respect to homosexuality" beyond the "written evidence" of the organization's viewpoint in its Manual of Procedure.²¹² Finally, the Court would conclude that the state's interests in eradicating discrimination based on sexual orientation, identical to those rejected in *Dale*, would "not justify such a severe intrusion on the [organization's] right[] to freedom of expressive association."²¹³

b. *Dale's Fatal Flaw*

This theoretical situation is, to some extent, based on two realities. First, the characteristics attributed to the hypothetical organization are those of Rotary International—the association involved in the *Duarte* litigation. Second, the discriminatory practices involved in the hypothetical situation are tailored to the facts of *Dale*. Yet this hypothetical situation illuminates a concern that neither *Duarte* nor *Dale* reveals standing alone; that is, even *assuming* the organization does not engage in its purported expression,²¹⁴ *Dale* requires the reviewing court to rule as if it did.

Perhaps more important, however, is the reason the reviewing court's

²¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000).

²¹¹ *Id.*

²¹² *Id.* at 651.

²¹³ *Id.* at 659.

²¹⁴ Indeed, the outside observer may only speculate whether BSA members sincerely engaged in anti-gay expression, whereas the hypothetical imputes the outside observer with the knowledge that the purported expression is insincere.

protection of the hypothetical organization appears more troubling than the *Dale* Court's protection of the BSA. Simply stated, the hypothetical organization alleged to engage in expressive values that *unquestionably* differed from those of its members. *Dale*, by contrast, presented a factual pattern in which the Court, and ultimately the reader of its opinion, was left to speculate as to whether the anti-gay views professed by the BSA truly represented those of its constituency. This distinction makes clear the conflict between the normative and descriptive conjectures of expressive association: although an organization's sincerity *should* be of primary consideration when determining questions of expressive association, the existing framework effectively disregards it.

c. *Conclusions: Hypothetical #1*

This section demonstrates the danger in broadly deferring to an organization's ostensible expression when granting First Amendment protection. Yet the organization's fraudulent activity in the hypothetical situation may have taken numerous forms. Organizational leaders may have surreptitiously included language similar to "morally straight" and "clean" in their bylaws with the sole purpose of minimizing future liability. Similarly, group leaders may have intentionally included such language in their handbooks as a "license" to discriminate. Indeed, the hypothetical situation involved the examination of bylaws for language supporting the discriminatory practices for which the organization was being sued—*ex post*. Yet in each of these cases, the rights of those protected by the First Amendment—the members—is never contemplated.

2. *Hypothetical #2: The Breadth of Discrimination Permitted*

Interested in community development, an ambitious young college student joined a national civic organization's local chapter in St. Paul, Minnesota. Assuming an active role in the organization, she began developing programs for adolescent members, recruiting through promotional materials, and participating in a wide range of activities at the local, state, and national levels. After numerous years of dedicated service, she received honorary membership for fostering a "spirit of genuine Americanism and civic interest"—the organization's purpose as noted in its bylaws.

Soon thereafter, the woman became pregnant out of wedlock. Bedridden for much of her pregnancy, she was unable to maintain many of her organizational responsibilities, but again became active in the organization after the child's birth. A local organizational leader, upon learning of her single motherhood, terminated her membership based on his belief that unwed mothers did not promote a positive role model to the organization's teenage girls. The young mother filed suit in state court, alleging a violation of the state's statutory prohibition of discrimination on the basis of both "marital" and "familial status" in places of public accommodation.

Prior to trial, the organization's president and vice president assembled with

counsel to discuss potential defenses to the allegation. After reviewing *Dale*, the attorneys advised the organization to proceed on the theory that unwed pregnancy and child rearing are inconsistent with the organization's expressive purpose to foster the "civic interest," as noted in the organization's bylaws.

a. *The Expansive Application of the Dale Rationale*

The reviewing court, in accord with *Dale*, would again rule in favor of the organization. Applying the first prong of expressive association analysis, the court would determine that the organization engages in a form of expression protected by the First Amendment because it transmits "a system of values."²¹⁵ In determining the substance of this expression, moreover, the court need only explore the nature of the organization's view of unwed mothers to the extent that its leaders testified as such. Indeed, the court "need not inquire further to determine the nature of the [organization's] expression" beyond the "instructive" evidence of the organization's viewpoint in its bylaws.²¹⁶ Finally, the reviewing court would hold that the state's interest in eradicating the discrimination against single parents does not outweigh the degree of state interference—identical to that in *Dale*.²¹⁷

b. *Dale's Fatal Breadth*

This hypothetical situation is again grounded on facts of existing case law. The characteristics of the theoretical organization, for example, were those of the Jaycees—the organization implicated in the *Roberts* litigation. In addition, the hypothetical statute prohibiting discrimination based on marital and familial status was the New Jersey public accommodation statute at issue in *Dale*. Indeed, even the form of discrimination is tailored to the facts of *Chambers v. Omaha Girls Club*,²¹⁸ an Eighth Circuit Court of Appeals decision in which an employer fired the arts and crafts teacher of a local girls club because the teacher was pregnant and unmarried.²¹⁹

The form of discrimination in the hypothetical, however, could have again taken numerous forms. Under the same theory, for example, organizational leaders could have instead excluded the child of the unwed mother or the spouse of a same-sex marriage. Moreover, no safeguard exists to prevent the exclusion of a child or spouse of an interracial marriage. In short, *Dale's* holding authorizes a broad range of invidious discrimination extending beyond homosexuality.²²⁰

²¹⁵ *Dale*, 530 U.S. at 649–51.

²¹⁶ *Id.* at 651.

²¹⁷ *Id.*

²¹⁸ 834 F.2d 697, 705 (1987) (upholding the firing of an unwed pregnant teacher because she was not a "positive role model" for the teenage girls in the organization).

²¹⁹ *See id.*

²²⁰ *See Estlund, supra* note 193, at 62 (noting that *Dale* indirectly "limits the extent to which voluntary associations can be counted on to foster connections across racial and ethnic

Given this extensive authorization of exclusionary practices, therefore, the prospect of incorporating our most vulnerable citizens into mainstream society appears increasingly doubtful.²²¹

c. *Conclusions: Hypothetical #2*

This section has illustrated two general themes, one prominent and the other discrete. The prominent theme is the extensive breadth of *Dale* and the specific forms of discrimination permissible under its holding. The discrete theme is merely a reaffirmation of an earlier premise—namely, the ability of organizational leaders to allege expressive values that differ from those of its members. The challenge, therefore, is to establish a mechanism by which courts may decipher the representative expressive purposes from the unrepresentative. Part V provides one such mechanism.

V. PROPOSAL: AN ALTERNATIVE APPROACH TO EXPRESSIVE ASSOCIATION

The touchstone of expressive association is the protection of individual liberty to associate for activities safeguarded by the First Amendment.²²²

lines, and it implicitly shifts that crucial function onto those institutions such as the workplace that *are* subject to regulations on behalf of equality”).

²²¹ See HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* 32 (1969). Clor argues that laws may reduce the incidence of certain acts and thus prevent individuals from forming habits they might otherwise form. *Id.* Accordingly, the absence of such legislation renders certain practices more widespread, thereby contributing to society’s sense that such conduct is unobjectionable. *Id.*; see also Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 136 (2000). Cox notes:

[H]eterosexual institutions, such as the [B]oy [S]couts . . . make[] clear the fear and discomfort that those demanding such separation feel. As long as sexual minorities are not permitted to join these institutions, the heterosexism inherent in each will remain unchecked. [This] would be the same as African-Americans accepting separate railroad cars or women accepting separate educational institutions. By agreeing to separation, we help them perpetuate their view of [homosexuals] as inferior.

Id.; see CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM* 59–60 (1996); Anna Gorman, *Scout Officials Support Court Decision on Gays; Morals: Gay and Lesbian Activists Register Dismay that Homosexuals Can Be Banned from Leading Boys’ Troops*, L.A. TIMES, June 29, 2000, at B4 (“[P]rohibiting homosexual troop leaders perpetuates an invalid stereotype that all gay men are pedophiles.”); see also France, *supra* note 135, at 48. (“[BSA supporters] worry about sexual abuse, despite the fact that gay authority figures don’t pose a disproportionate threat to kids.”). Moreover, the American Medical Association warns that “stigmatizing homosexuality can contribute to major depression and suicide among gay youth.” *Id.* at 50.

²²² See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (noting that “[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties,” free association is implicated “when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor,” and that “the Bill of Rights is designed to secure individual liberty”) (emphasis added).

Enforcement of this right is founded on an organization's ability to articulate its members' expressive values in a judicial forum. Yet the nexus between individual members and the organization litigating on their behalf becomes attenuated when group leaders purport to maintain values that, in fact, differ from those of its constituency.²²³ In short, the contemporary framework of expressive association gives little, if any, consideration to this issue.²²⁴

The judicial disregard for potential discrepancies existing between the values expressed by organizational litigants and those of its members is likely attributable to two factors: first, the arduous, if not impossible, task of ascertaining the expressive values held by each member; and second, the corresponding need to determine the degree of member acquiescence necessary to render the purported activity a legitimate form of group expression. This section provides an alternative approach to expressive association that would (1) bridge the gulf between an organization's suggested expressive values and those of its members; (2) circumvent the need to discern the expressive values held by each member; (3) alleviate the task of determining the degree of member conformity sufficient to constitute legitimate group expression; and (4) render outcomes consistent with established precedent.²²⁵

A. *The Reasonable Member*

At its most fundamental level, the attenuated nexus between organizational members and their representative litigants is attributable to the Court's deference to the litigants' subjective beliefs. Many spheres of legal doctrine, by comparison, presuppose a uniform, objective standard of behavior for determining questions of liability or guilt.²²⁶ Because the "infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct[.]"²²⁷ courts have created a fictitious being: the "reasonable

²²³ See *supra* note 172 and accompanying text. The Court recognized this concern in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In *Austin*, the Court upheld the Michigan Campaign Finance Act, which prohibited corporations from using corporate treasury funds for independent expenditures to support or oppose political candidates. The Court distinguished corporations from other expressive organizations because the individual members of corporations may disagree with the corporation's political agenda.

²²⁴ See Backer, *supra* note 162, at 140 (noting that *Dale* is one of a "growing line of Supreme Court cases in which facts are stretched to suit the applicability of doctrine, in this case a subsidiary doctrine of constitutional interpretation").

²²⁵ As Professor Lawrence Lessig notes in a different context, the proper manner in which to approach questions of constitutional protection is "to choose in a way that is faithful to the choices of the past, to translate the commitments of the past into a fundamentally different context. . . . [T]he constitutional translator construct[s] an application that, though different from the original application, has the same meaning in the current context as the original did in its context." LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 109 (1999).

²²⁶ See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32 (5th ed. 1984).

²²⁷ *Id.*

person”²²⁸—or, in the context of expressive association, the “reasonable member.”

1. *The General Premise*

Given *Dale*’s problematic inquiry into the subjective beliefs of the organizational litigants, the reasonable member approach provides an alternative standard that objectively determines the validity of suggested organizational expression. This approach inquires whether a reasonable member of that organization understands the organization to engage in its purported expression.²²⁹ Proper application of the reasonable member approach, however, requires courts be cognizant that the inquiry is *not* concerned with the expression of the reasonable member,²³⁰ but with the expression in which the reasonable member understands the *organization* to engage.

2. *Limited Application in the Analytic Framework*

Application of the reasonable member in the analytic framework of expressive association is limited to determining the *content* of the organization’s expression.²³¹ Thus, its relevance is restricted to either the first stage of the

²²⁸ *Id.*

²²⁹ One key component to the reasonable member approach is its objective inquiry into the expression in which the reasonable member would have understood the organization to engage *before* the commencement of litigation, thereby prohibiting a group from alleging fraudulent expression *ex post*. In this way, the reasonable member approach is akin to the well-established method of argumentation established by John Rawls, commonly referred to as the “veil of ignorance.” JOHN RAWLS, A THEORY OF JUSTICE 136 (1971). Rawls bases this theory on the notion that decisions of justice should be made in the “original position”—a hypothetical situation in which rational individuals, acting in their self-interest, perceive themselves as choosing social rules *before* they enter society. The restriction on their decisions, however, is the “veil of ignorance,” which occludes individuals from knowing particular facts about themselves, such as their social status, intelligence, age, race, and gender. *Id.* at 137. Individuals so situated, Rawls argues, will objectively affirm the equality of basic rights by “nullify[ing] the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advance.” *Id.* at 136.

²³⁰ Similarly, the reasonable member inquiry is not concerned with whether the reasonable member agrees with the expression in which the organization engages. One scholar has noted, for example, that “[t]he Scouts may be right to suppose that many parents would withdraw their children from the movement if it appeared to shelter leaders proselytizing for homosexual lifestyles.” Carrington, *supra* note 1. Yet the reasonable member inquiry is indifferent toward whether such parents would agree with the BSA’s exclusion of homosexuals; rather the inquiry is only concerned with whether parents—or, more precisely, the reasonable member—would understand the *organization* to engage in such expression.

²³¹ As applied to the facts of *Dale*, the reasonable member approach may be relevant in two contexts. First, as described in this section, the reasonable member may be applied to determine the expressive purpose of the BSA. Second, the approach may be applied merely as means of interpreting ambiguous language in organizational documents, such as “morally straight” and “clean.” In the latter case, the proper inquiry is whether the reasonable member of

framework, in which courts determine whether the organization engages in “some form of expression,”²³² or the second stage, in which courts determine whether the challenged state action infringes upon that message. Yet its precise stage of application will often be ill-defined given the interlocutory nature of these two inquiries.

3. *Conceptualization: The Scope of the Reasonable Member*

The reasonable member is perhaps best expounded in terms of a fictitious organizational member who comprehends a scope of the group’s expressive purpose. This scope is determined by a variety of factors, including the frequency with which the expression is exercised, the conspicuousness with which the organization engages in the expression, and the dissemination of information concerning the expression to the constituency. Thus, when an organization alleges infringement of its expressive values and those values are beyond the scope of the reasonable member, the organization’s claim fails. Alternatively, when an organization asserts an infringement of its expressive values and those values are consistent with the scope of the reasonable member, the purported expression is validated and the reviewing court considers whether the challenged state infringement significantly affects that expression.

4. *Advantages to the Reasonable Member Approach*

The reasonable member approach alleviates many of the theoretical and pragmatic concerns raised by *Dale*. First, *Dale* illuminates the risk that organizational litigants will claim expressive values that differ from those of its members. Under the reasonable member approach, however, expressive values not shared by a constituency will not represent the organization as a whole, as the reasonable member would not so perceive the group’s expression. Second, *Dale* fashions the danger that individuals will unknowingly pledge to an organization maintaining expressive values with which they disagree.²³³ Yet the reasonable member approach permits both current and prospective members to avoid such misguided allegiance because each member is effectively on notice of the organization’s expression as understood by the reasonable member.²³⁴ Finally,

the BSA would understand the terms “morally straight” and “clean” to constitute anti-gay expression.

²³² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

²³³ See *supra* note 175; see also France, *supra* note 135, at 46 (“By the organization’s own internal polls, 30 percent of Scout parents don’t support the current policy . . .”). Indeed, “at a time when Girl Scouts, Boys & Girl Clubs and other youth groups are growing in popularity,” membership in the BSA dropped 4.5% after the *Dale* litigation exposed the BSA’s purported anti-gay policy. *Id.* at 47.

²³⁴ Rabbai Menitoff, for example, was quoted by *The New York Times* as stating, “[b]eing a Boy Scout really had an influence on my life, . . . [but] I felt it was untenable to support or be part of an organization that discriminated against a group of people.” Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts*, N.Y. TIMES, Jan. 10, 2001, at A12. In addition,

Dale illustrates that judicial consideration of each member's understanding of the purported expression is implausible given the large number of members affiliated to many organizations and the corresponding need to determine the degree of member acquiescence sufficient for legitimate group expression. The reasonable member approach, however, evades such problematic enterprises while indirectly considering the views of individual members.

B. Application of the Reasonable Member

The reasonable member approach is also in harmony with the Court's expressive association precedent. In *Roberts*, for example, the expressive activity relied upon by the Jaycees was the exclusion of women. The Court presupposed that members of the organization sincerely subscribed to this view because of its obvious nature; that is, the organization's exclusion of women would have clearly fallen within the scope of expressive values as understood by the reasonable member of the Jaycees.

The *Duarte* Court likewise presupposed that Rotary Club members held views in accord with those suggested by the organization—again, the exclusion of women. This supposition is similarly attributable to the fact that the practice of excluding women was so prevalent as to plainly come within the scope of expressive values comprehended by the reasonable member of the local Rotary Club.

Dale, by contrast, was the first decision to address the “sincerity” of an organization's purported expression.²³⁵ And not coincidentally, the decision marked the first time an organization alleged expressive views not clearly within the scope of the reasonable member.²³⁶ Yet whether the reasonable member of the BSA would understand the organization to engage in anti-gay expression is not of primary concern. The fundamental inquiry instead considers future cases and whether the reasonable member approach will better remedy the problem of which *Dale* warns—namely, bridging the discrepancy between an organization's suggested expressive values and those of its members. To that end, it seems undeniable that courts would better protect the First Amendment liberties of organizational members by inquiring whether a reasonable member understands the organization to engage in its purported expression than by granting unbridled discretion to the ostensible views of organizational litigants.

Ken Cowing, who “had always been proud to wear his scoutmaster uniform,” thought about “putting it away” after the *Dale* decision and, along with Cub Scout Pack 5, mailed a petition to BSA headquarters. John Sullivan, *N.J. Law; Rallying the Troops*, N.Y. TIMES, Oct. 29, 2000, at 14NJ8. Even BSA parent Lynda Montague stated that the “ruling persuaded her to prevent her 8-year-old son from joining the scouts when he gets older.” Andrew Jacobs, *The Reaction: Victory Has Consequences of Its Own*, N.Y. TIMES, June 29, 2000, at A28.

²³⁵ *Dale*, 530 U.S. at 651–52.

²³⁶ See Backer, *supra* note 162, at 122 (stating that *Dale* is a “landmark[] of First Amendment decline”).

VI. CONCLUSION

This note commenced with a discussion of Myra Bradwell, whose application to practice law was rejected on the basis of her gender, and Mildred and Richard Loving, whose interracial marriage served as the basis for criminal conviction.²³⁷ These cases reveal the manner in which the judiciary may justify discriminatory practices on moral grounds.²³⁸ Yet, as this note has aimed to demonstrate, such decisions have been problematic both in their long-term stability and their present-day legitimacy in authorizing discrimination.²³⁹

The *Dale* Court rekindled these same concerns in its deference to the BSA's claim that the terms "morally straight" and "clean" constitute anti-gay expression.²⁴⁰ Although the Court attempted to distance itself from such an inference, its broad deference to the BSA's interpretation effectively resulted in a judicial disregard for potential discrepancies existing between the values expressed by organizational litigants and those of its members.²⁴¹

Dale thus illustrates the need for an alternative approach to expressive association that protects the liberties of individual members.²⁴² The reasonable member inquiry provides one such approach.²⁴³ Although this alternative will not fully eradicate fraudulent organizational representation, it is a step forward in bridging the gap between those who assert an organization's expressive values and those who actually hold them.

²³⁷ See *supra* notes 2–9 and accompanying text.

²³⁸ See *supra* notes 15–16 and accompanying text.

²³⁹ See *supra* notes 17–25 and accompanying text.

²⁴⁰ See *supra* notes 161–94 and accompanying text.

²⁴¹ See *supra* notes 172–78 and accompanying text.

²⁴² See *supra* notes 195–225 and accompanying text.

²⁴³ See *supra* notes 226–36 and accompanying text.

