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## Constitutional Law - Deference to Discriminators: Boy Scouts of America v. Dale

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# CONSTITUTIONAL Law—Deference to Discriminators: *Boy Scouts of America v. Dale*

## I. INTRODUCTION

In *Boy Scouts of America v. Dale*,<sup>1</sup> the United States Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to accept James Dale, an avowed homosexual, as an assistant scoutmaster in the organization violated the Boy Scouts's First Amendment right of expressive association.<sup>2</sup> This Note examines the Supreme Court's treatment of the Boy Scouts's expressive associational rights in relation to preceding decisions,<sup>3</sup> analyzes the *Dale* Court's rationale in finding that New Jersey's public accommodations law violated the Boy Scouts's right of expressive association, and explores the implications of the decision.

## II. STATEMENT OF THE CASE

In 1978, James Dale joined the Boy Scouts at the age of eight.<sup>4</sup> Over the course of his youth membership in the Boy Scouts, Dale earned thirty merit badges, held numerous leadership positions, and achieved the highest rank of Eagle Scout.<sup>5</sup> In 1989, Dale applied for and was approved for adult membership in the Boy Scouts.<sup>6</sup> He then began serving as assistant scoutmaster of Troop 73. Around the same time he applied for adult membership, Dale began attending Rutgers University, where he first acknowledged that he was gay. Dale joined the Rutgers University Lesbian/Gay Alliance, later becoming its co-president. In 1990, Dale attended a seminar on the psychological and health needs of homosexual teenagers. A newspaper covering the event published an interview with Dale, including a photograph of Dale identifying him as the co-president of the Rutgers University Lesbian/Gay Alliance.

Shortly thereafter, Dale received a letter from Monmouth Council Executive<sup>7</sup> James Kay, informing Dale that his adult membership had been revoked. Kay notified Dale that his dismissal was based on the standards set forth by the Boy Scouts that "specifically forbid membership to homosexuals."<sup>8</sup> Dale responded by filing a complaint against the Boy Scouts in the Superior Court of New Jersey, alleging that the Boy Scouts violated New Jersey's public accommodations statute<sup>9</sup>

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1. 530 U.S. 640 (2000).

2. *See id.* at 644.

3. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

4. *Dale*, 530 U.S. at 644.

5. *Dale v. Boy Scouts of America*, 706 A.2d 270, 275 (1998).

6. *Dale*, 530 U.S. at 644. All subsequent factual references refer to this citation, unless otherwise cited.

7. The Boy Scouts divides its organization into national, regional, and local organizations. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1201 (1999). Defendant, Monmouth Council, is one of sixteen local Boy Scouts councils in New Jersey. *Id.*

8. *Dale*, 530 U.S. at 644.

9. N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (West 2000). New Jersey's public accommodations statute forbids, among other things, discrimination on the basis of sexual orientation in places of public accommodation.

and its common law when it revoked Dale's membership based exclusively on his sexual orientation.<sup>10</sup>

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts, rejecting Dale's statutory and common law claims.<sup>11</sup> The New Jersey Superior Court's Appellate Division then affirmed the denial of Dale's common law claim but otherwise reversed.<sup>12</sup> Finally, the New Jersey Supreme Court affirmed the judgment of the Appellate Division.<sup>13</sup> The court found that the Boy Scouts do not associate for the purpose of disseminating the belief that homosexuality is immoral, thus concluding that the state's interest in eradicating discrimination outweighed the small impact that the statute had on the right of the Boy Scouts to expressive association.<sup>14</sup>

Following the New Jersey Supreme Court's decision that James Dale's membership did not violate the Boy Scouts's right of expressive association, the Boy Scouts petitioned the United States Supreme Court to decide whether the application of New Jersey's public accommodations law violated the First Amendment.<sup>15</sup> The United States Supreme Court granted the Boy Scouts's petition for certiorari and reversed the judgment of the New Jersey Supreme Court.<sup>16</sup> The Court held that the application of New Jersey's public accommodations law violated the Boy Scouts's First Amendment rights to freedom of expressive association.<sup>17</sup>

### III. BACKGROUND

In order to eradicate discrimination in places of public accommodation,<sup>18</sup> the New Jersey Legislature enacted the Law Against Discrimination (LAD) in 1945.<sup>19</sup> The

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10. See *Dale*, 530 U.S. at 644-46. According to New Jersey common law, the "courts will invalidate an expulsion from a private organization when the expulsion is based on reasons that violate public policy." *Dale*, 706 A.2d at 283 (quoting *Rutledge v. Gulian*, 93 N.J. 113, 119, 459 A.2d 680, 683 (1983)).

11. See *Dale*, 530 U.S. at 645. The court concluded that New Jersey's public accommodations law did not apply to the Boy Scouts because it was not a place of public accommodation, and alternatively, because the Boy Scouts was a private group that fell within the "distinctly private" exception to the statute. *Id.* The court rejected Dale's common law claim on the ground that the claim was duplicative of the New Jersey public accommodations law. See *id.* The court also held that the Boy Scouts's First Amendment rights to expressive association prevented the State from forcing the Boy Scouts to accept Dale. *Id.*

12. See *Dale*, 706 A.2d at 274. The Appellate Division held that New Jersey's public accommodations law applied to the Boy Scouts, the Boy Scouts's expulsion of Dale deprived him of a public accommodation, and New Jersey's public accommodations law did not infringe upon the Boy Scouts's freedom of expressive association. See *id.*

13. See *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1200 (1999).

14. See *id.* at 1223.

15. See *Dale*, 530 U.S. at 647.

16. See *id.* at 601. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *Id.* at 644. Justice Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined. *Id.* at 663. Justice Souter also filed a dissenting opinion, in which Justices Ginsburg and Breyer joined. *Id.* at 700.

17. See *id.* at 644.

18. See N.J. STAT. ANN. 10:5-3 (West 2000).

19. See N.J. STAT. ANN. 10:5-4 (West 2000). The statute provides that

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable to all

legislature determined that discrimination because of race, creed, color, national origin, ancestry, age, sex, or marital status "threatens not only the rights and proper privileges of the inhabitants of the State, but menaces the institutions and foundation of a free democratic State."<sup>20</sup> In 1991, the Legislature amended the statute to include "affectional or sexual orientation" among the protected categories.<sup>21</sup> It is the constitutionality of applying this New Jersey statute to the Boy Scouts that was at issue in *Dale*.<sup>22</sup>

In a line of decisions prior to *Dale*, the Supreme Court recognized the right to associate for the purpose of engaging in activities protected by the First Amendment.<sup>23</sup> In each of those decisions, the Court examined the constitutionality of applying a state public accommodations law to compel an organization to admit persons of a protected group.<sup>24</sup> In *Roberts v. Jaycees* and in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that applying the state's public accommodations law to compel the organization to accept women as regular members did not abridge male members' freedom of expressive association.<sup>25</sup> In contrast, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that the application of the state's public accommodation law to require organizers to alter the content of their parade violated the First Amendment.<sup>26</sup> The *Dale* Court used the reasoning in each of these decisions in determining whether or not applying New Jersey's public accommodations law to the Boy Scouts is constitutional.<sup>27</sup>

#### A. *Roberts and the Freedom of Expressive Association*

In *Roberts*, the Minneapolis and St. Paul chapters of the United States Jaycees (Jaycees)<sup>28</sup> began admitting women as regular members in violation of the national organization's bylaws, which limited regular membership to young men between the ages of eighteen and thirty-five.<sup>29</sup> The national organization sanctioned the local

persons. This opportunity is recognized as and declared to be a civil right.

20. N.J. STAT. ANN. 10:5-3 (West 2000).

21. See N.J. STAT. ANN. 10:5-4 (West 2000).

22. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

23. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). The Court in *New York State Club Ass'n* upheld Local Law No. 63, an amendment to New York City's Human Rights Law that made it unlawful to discriminate in any "institution, club, or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." 487 U.S. at 6 (quoting N.Y.C. Admin. Code § 8-102(9) (1986)). The Court determined that the amendment targeted clubs that had characteristics similar to the clubs in *Roberts* and *Rotary Club*. See *id.* at 11-12. Although *New York State Club Ass'n* is important in the development of the right to freedom of expressive association, this note focuses on *Roberts*, *Rotary Club*, and *Hurley*, the cases upon which the *Dale* Court primarily focused.

24. See *Hurley*, 515 U.S. at 2340-41; *Rotary Club*, 481 U.S. at 539; *Roberts*, 468 U.S. at 612.

25. See *Rotary Club*, 481 U.S. at 549; *Roberts*, 468 U.S. at 612.

26. See *Hurley*, 515 U.S. at 559.

27. See *Dale*, 530 U.S. at 653-59.

28. The Jaycees is a nonprofit membership corporation whose purpose is to promote the growth and development of young men's civic organizations in the United States. See *Roberts*, 468 U.S. at 612.

29. See *Roberts*, 468 U.S. at 613-14. Associate membership was available to women and older men. See *id.*

chapters and informed them that a motion would be made to revoke their charters.<sup>30</sup> The local chapters responded by filing charges of discrimination with the Minnesota Department of Human Rights, alleging that the exclusion of women violated the Minnesota Human Rights Act.<sup>31</sup> The national organization then brought suit in federal court seeking declaratory and injunctive relief to prevent enforcement of the Act.<sup>32</sup>

In analyzing the First Amendment freedom of expressive association claim, the *Roberts* Court considered three factors: (1) the nature of the associational right asserted,<sup>33</sup> (2) the extent of governmental infringement on that right,<sup>34</sup> and (3) the compelling state interest used to justify any infringement.<sup>35</sup> The Court found that the Jaycees had an associational right to take public positions on diverse issues and to engage in civic, charitable, lobbying, fundraising, and other expressive activities.<sup>36</sup> The *Roberts* Court also determined that the Jaycees' associational right was impaired by the Minnesota Human Rights Act, which interfered with the internal organization and affairs of the Jaycees by requiring the Jaycees to admit women as full voting members.<sup>37</sup> The Court stated, however, that this interference did not place "any serious burdens" on the organization's freedom of expressive association.<sup>38</sup> The Court held that the admission of women would not hinder the organization's ability to disseminate its views or to exclude persons holding contrary ideologies.<sup>39</sup> The Court found it significant that the Jaycees already permitted participation by women as associate members.<sup>40</sup> The Court rejected the Jaycees' contention that allowing women members to vote would impair the organization's ability to promote the views of young men, as the Court asserted that such assumptions

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at 613. Associate members, however, could not vote, hold office, or participate in certain training and awards programs. *See id.*

30. *See id.* at 614.

31. *Id.* The Minnesota Human Rights Act provides, "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.* (MINN. STAT. § 363.03 (3) (1982)).

32. *See Roberts*, 468 U.S. at 615. The actual procedural history in this case is more complicated. In response to the filing of the suit, the District Court, with the agreement of the parties, dismissed the suit without prejudice until the state administrative proceeding ruling. *Id.* After the examiner in the administrative hearing concluded that the Jaycees violated the Minnesota Human Rights Act, the Jaycees filed a renewed complaint in the District Court, which certified the question of whether the Jaycees is a "place of public accommodation" to the Minnesota Supreme Court. *Id.* at 615-16. Upon the Minnesota Supreme Court's conclusion that the Jaycees is a place of public accommodation, the Jaycees amended its complaint to add a claim that the Minnesota Supreme Court's interpretation of the Act was unconstitutional. *Id.* at 616. The District Court found for the state officials, but the Eighth Circuit reversed on appeal. *Id.*

33. *See id.* at 626-27.

34. *See id.*

35. *See id.* at 623. "The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

36. *See id.* at 626-27.

37. *See id.* at 623.

38. *Id.* at 626.

39. *See id.* at 627.

40. *See id.* Since the Jaycees permitted women to participate in many of the organization's activities, the Court determined that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." *Id.*

impermissibly rely on sexual stereotyping of the relative perspectives of men and women.<sup>41</sup>

Finally, the Court concluded that the slight impact the Minnesota Act had on the Jaycees' freedom of association was justified by Minnesota's compelling interest in eradicating discrimination against women.<sup>42</sup> The Court recognized that assuring women equal access to leadership skills and business contacts furthers compelling state interests.<sup>43</sup> The Court thus held that the application of the Minnesota Human Rights Act to the Jaycees, compelling the organization to accept women as regular members, did not violate the organization's First Amendment rights of expressive association.<sup>44</sup>

### *B. Rotary Club and Its Application of Roberts*

The Supreme Court again faced a First Amendment challenge to the forced inclusion of women in a membership organization open only to men in *Board of Directors of Rotary International v. Rotary Club of Duarte*.<sup>45</sup> The Court used the framework established in *Roberts* to analyze Rotary International's constitutional claims.<sup>46</sup>

Rotary International was a nonprofit corporation whose individual members each belonged to a local Rotary Club.<sup>47</sup> Rotary International declared itself to be "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."<sup>48</sup> Although membership in the organization was limited to men,<sup>49</sup> the Rotary Club classification system sought to represent a cross-section of the business community.<sup>50</sup> When the local Rotary Club of Duarte admitted three women to active membership, Rotary International revoked the Duarte Club's charter and terminated its membership in Rotary International.<sup>51</sup> The Duarte Club and two of its women members then filed suit in the California Superior

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

42. See *id.* at 623.

43. See *id.* at 626.

44. See *id.* at 612.

45. 481 U.S. 537 (1987).

46. See *id.* at 544. This framework provided that the Court was to consider separately the effect of the challenged state action first on an individual's choice to enter into and maintain certain intimate or private relationships and then on the individual's freedom to associate for the purpose of engaging in protected speech or religious activities. See *Roberts*, 468 U.S. at 617-18.

47. See *Rotary Club*, 481 U.S. at 539.

48. *Id.*

49. See *id.* at 541.

50. See *id.* at 540. The purpose of the classification system was to ensure "that each Rotary Club includes a representative of every worthy and recognized business, professional, or institutional activity in the community." *Id.* (quoting 2 Rotary Basic Library, Club Service 67-69 (1981), App. 86).

51. See *id.*

Court, alleging that Rotary International violated the Unruh Civil Rights Act<sup>52</sup> when it prohibited the admission of women into the organization.<sup>53</sup>

When this case reached the United States Supreme Court, the Court, as it did in *Roberts*,<sup>54</sup> first considered whether application of the public accommodations law interfered with the organization's ability to carry out its purposes.<sup>55</sup> The Court determined that the Unruh Act did not infringe on Rotary members' right of expressive association because the admission of women would not alter Rotary Clubs' goals of humanitarian service, high ethical standards in all vocations, good will, and peace.<sup>56</sup> Moreover, the Court found that the Unruh Act did not require the organization to abandon its classification system or to admit members who did not represent a cross-section of the community.<sup>57</sup> In fact, the Court noted that admitting women would actually further the Rotary Club's expressed interest in obtaining members who represent every business or professional activity in the community.<sup>58</sup> The Court then stated that, even if the Unruh Act worked some slight infringement on the Rotary members' right of expressive association, that infringement was justified by the state's compelling interest in eliminating discrimination against women.<sup>59</sup> Noting that the *Roberts* Court recognized a compelling state interest in providing women equal access to leadership skills and business contacts,<sup>60</sup> the Court determined that the Unruh Act served the same compelling state interest.<sup>61</sup> For these reasons, the *Rotary* Court held that application of the Unruh Act to California Rotary Clubs did not violate the organization's right of expressive association.<sup>62</sup>

### C. Hurley and Forced Expression

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the city of Boston authorized the South Boston Allied War Veterans Council to organize and conduct the St. Patrick's Day-Evacuation Day Parade.<sup>63</sup> The Council refused admission into the parade to the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), an organization formed for the purpose of marching in the parade as a way for its members to express pride in their Irish heritage as gay, lesbian, and

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52. See CAL. CIV. CODE § 51 (1982). The Unruh Civil Rights Act provides, in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.* The Act has since been amended to include disability and medical condition among the protected traits. See CAL. CIV. CODE § 51 (2000).

53. See *Rotary Club*, 481 U.S. at 541-42. The Superior Court entered judgment for Rotary International, concluding that neither the Rotary Club nor the Duarte Club is a "business establishment" within the meaning of the Unruh Act. See *id.* at 542. The California Court of Appeal reversed, reinstating the Duarte Club as a member of Rotary International and enjoining them from enforcing the gender requirement against the Duarte Club. See *id.* at 542-43. The California Supreme Court denied appellants' petition of review. *Id.* at 543. The United States Supreme Court, concluding that it had appellate jurisdiction, affirmed the judgment of the Court of Appeal. *Id.*

54. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

55. See *Rotary Club*, 481 U.S. at 548.

56. See *id.*

57. See *id.*

58. See *id.* at 548-49.

59. See *id.* at 549.

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

61. See *Rotary Club*, 481 U.S. at 549.

62. See *id.*

63. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 560 (1995).

bisexual individuals.<sup>64</sup> In response to the Council's refusal to admit the group in the parade,<sup>65</sup> GLIB filed suit in state district court, alleging that the Council violated the state public accommodations law.<sup>66</sup>

In ruling that GLIB was entitled to participate in the parade, the trial court concluded that GLIB's admission would not interfere with the Council's First Amendment right to expressive association. The trial court stated that the parade lacked a common theme and a specific expressive purpose, as evidenced by the lack of selectivity in choosing participants and the failure to circumscribe the marchers' message.<sup>67</sup> The Supreme Judicial Court of Massachusetts affirmed, holding that the trial court's findings were not clearly erroneous.<sup>68</sup> The United States Supreme Court granted certiorari to determine whether application of Massachusetts public accommodations law to force parade organizers to include members of GLIB among its marchers violated the parade organizers' First Amendment rights of expressive association.<sup>69</sup>

After finding that parades are inherently expressive,<sup>70</sup> the Supreme Court held that application of the statute violated the parade organizers' First Amendment rights, in which a speaker has the autonomy to choose the content of his own message.<sup>71</sup> This autonomy includes the right both to express one's values and to not express others.<sup>72</sup> The Court determined that, in the context of an expressive parade, each unit of a parade contributes to the message as a whole.<sup>73</sup> The Court noted that the individual admission of homosexual members into the parade was not in dispute; rather, the disagreement lay in the admission of GLIB as a parade unit carrying its own banner.<sup>74</sup> Although the Court found a legitimate state interest in the Massachusetts public accommodations law in eradicating discrimination,<sup>75</sup> it found that the state's use of its power under that law impermissibly violated the parade organizers' rights to choose the content of its own message.<sup>76</sup> The Court concluded that the forced inclusion of GLIB unconstitutionally infringed on the Council's right to freedom of expression.<sup>77</sup>

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64. *See id.* at 561.

65. *See id.*

66. MASS. GEN. LAWS ANN. Ch. 272, § 98 (1990). Massachusetts public accommodations law prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation..., deafness, blindness, or any physical or mental disability or ancestry" in "the admission of any person to; or treatment in any place of public accommodation, resort or amusement." *See also Hurley*, 515 U.S. at 571-72.

67. *See Hurley*, 515 U.S. at 562-63.

68. *See id.* at 563-64. The trial court found that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, and that the parade was a public accommodation.

69. *See id.* at 566.

70. *See id.* at 568. The Court determined that the word "parade" indicated marchers who were making some sort of collective point. *Id.* Therefore, the Court concluded that parades are a form of expression, not just motion. *Id.*

71. *See id.* at 573.

72. *See id.*

73. *See id.* at 577.

74. *See id.* at 572.

75. *See id.* at 571. "The Massachusetts public accommodations law...has a venerable history." *Id.*

76. *See id.* at 573.

77. *See Hurley*, 515 U.S. at 573. In denying GLIB admission into the parade, the Court reasoned, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond

The *Roberts*, *Rotary Club*, and *Hurley* decisions mark the Supreme Court's recognition of a private organization's freedom to associate for the purpose of expressive activities.<sup>78</sup> In *Roberts* and *Rotary Club*, the Court held that the state's compelling interest in assuring women equal access to leadership and business contacts outweighed the slight infringement on the groups' right of expressive association.<sup>79</sup> In contrast, the Court in *Hurley* found that the state interest in eradicating discrimination did not outweigh the substantial infringement on the parade organizers' right to choose the content of their own message.<sup>80</sup> Thus, these decisions represent the ends of a continuum of First Amendment expressive associational rights. The *Dale* Court looked at each of these decisions to determine where the Boy Scouts's right of expressive association was located on this continuum.

#### IV. RATIONALE

In reaching its decision, the *Dale* Court relied on the premise that First Amendment rights imply a corresponding right to associate with others who share similar political, economic, social, educational, religious, and cultural views and not to associate with those who do not share such views.<sup>81</sup> This right to associate is free from government interference into the organization or internal workings of the group, unless such interference serves a compelling state interest.<sup>82</sup> In determining whether the application of New Jersey's public accommodations law violated the Boy Scouts's First Amendment freedom of association rights, the *Dale* Court considered the three factors that were identified in *Roberts*.<sup>83</sup> Specifically, the *Dale* Court addressed (1) whether the Boy Scouts engages in "expressive association,"<sup>84</sup> (2) whether the forced inclusion of Dale as assistant scoutmaster negatively affects the ability of the Boy Scouts to communicate its message,<sup>85</sup> and (3) whether the application of New Jersey's LAD impermissibly infringes on the Boy Scouts's right to freedom of expressive association.<sup>86</sup>

In *Dale*, the United States Supreme Court first examined whether the Boy Scouts engaged in "expressive association."<sup>87</sup> The Court independently reviewed the factual record,<sup>88</sup> finding that the mission of the Boy Scouts is "to instill values in young people."<sup>89</sup> Some of these values are expressed in the Scout Law. "A Scout is:

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the government's power to control." *Id.* at 575.

78. See *Hurley*, 515 U.S. at 573; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

79. See *Rotary Club*, 481 U.S. at 549; *Roberts*, 468 U.S. at 626.

80. See *Hurley*, 515 U.S. at 573.

81. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000); *Roberts*, 468 U.S. at 622 ("According to 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.").

82. See *Roberts*, 468 U.S. at 622-23.

83. See *supra* notes 33-35 and accompanying text.

84. *Dale*, 530 U.S. at 648-53.

85. See *id.* at 653-56.

86. See *id.* at 656-61.

87. See *id.* at 648.

88. See *id.* at 648-49.

89. *Id.* at 649 (quoting the Boy Scouts's mission statement).

Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.”<sup>90</sup> The Court determined that scoutmasters and assistant scoutmasters inculcate youth members with the values of the Boy Scouts by both expression and example.<sup>91</sup> Thus, the Court concluded that instilling such values in the youth scouts constitutes expressive activity.<sup>92</sup>

The *Dale* Court next determined whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts’s ability to express its views.<sup>93</sup> This question required analyzing the Boy Scouts’s views on homosexuality.<sup>94</sup> The Boy Scouts relied on the terms “morally straight” and “clean” in its Scout Oath and Law to support its assertion that homosexuality is inconsistent with its values.<sup>95</sup> The Court also looked at previous position statements promulgated by the Boy Scouts as evidence of the Boy Scouts’s expression that homosexuality and leadership in the organization are inappropriate.<sup>96</sup> Although the Court examined evidence demonstrating the Boy Scouts’s beliefs regarding homosexuality, it did not rely on such proof in its conclusion that the Boy Scouts advocate that homosexual conduct is not morally straight.<sup>97</sup> Rather, the Court gave deference both to the organization’s assertions concerning the nature of its expression and to the organization’s view of what would impair its expression.<sup>98</sup> While the Court noted that such deference was limited,<sup>99</sup> it found that Dale’s openness about his homosexuality, his being a gay rights activist, and his being co-president of a gay and lesbian organization forced the Boy Scouts to send a message that the organization accepts homosexuality as a legitimate form of behavior.<sup>100</sup>

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90. *Id.* at 649-50.

91. *See id.* at 650.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.* The Boy Scout Handbook defines “morally straight” as follows: “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 become virtuous and self-reliant.” *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1202-03. The Boy Scout Handbook defines “clean” as follows: “A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean. You never need to be ashamed of dirt that will wash off.... There’s another kind of dirt that won’t come off by washing. It is the kind that shows up in foul language and harmful thoughts....” *Id.* at 1203.

96. *See Dale*, 530 U.S. at 651-53. A 1978 position statement to the Boy Scouts’s Executive Committee, signed by Downing B. Jenks, President of the Boy Scouts, and Harvey L. Price, Chief Scout Executive, states that the Boy Scouts of America “do not believe that homosexuality and leadership in Scouting are appropriate.” *Id.* at 651-52. A 1991 position statement by the Boy Scouts stated that the organization “believed that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and...clean...and that homosexuals do not provide a desirable role model for Scouts.” *Id.* at 652. Similarly, a 1993 position statement read that the Boy Scouts “has always reflected the expectations that Scouting families have had for the organization” and the organization does not believe “that homosexuals provide a role model consistent with these expectations.” *Id.*

97. *See id.* at 652-53.

98. *See id.*

99. *See id.* at 653. “That is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” *Id.*

100. *Id.* at 653.

The Court compared the forced inclusion of Dale as assistant scoutmaster to the forced presence of GLIB in the private St. Patrick's Day parade.<sup>101</sup> The Court found that, just as the presence of GLIB marching in the parade interfered with the parade organizer's choice of message, Dale's presence forced the Boy Scouts to promulgate a message contrary to its beliefs.<sup>102</sup> The Court also rejected the New Jersey Supreme Court's conclusion that Dale's acceptance would not significantly affect the Boy Scouts' message.<sup>103</sup> The Court reasoned that (1) associations do not have to associate for the "purpose" of disseminating a certain message to be entitled to First Amendment protections; (2) the First Amendment protects the method of expression used by an association, even if that method is to not address sexual issues and to lead by example; and (3) not all members of a group have to agree on a certain viewpoint in order for the group to enjoy First Amendment protections.<sup>104</sup> The Court thus concluded that the forced inclusion of Dale would significantly alter the Boy Scouts's expression.<sup>105</sup>

The Court then turned to the question of whether application of New Jersey's LAD infringed on the Boy Scouts's freedom of expressive association.<sup>106</sup> While the Court found that the purpose of the New Jersey public accommodations laws was to eradicate discrimination,<sup>107</sup> it held that such interests did not justify the severe intrusion on the Boy Scouts's rights to freedom of expressive association.<sup>108</sup> The Court noted that First Amendment protections extend to expressions, whether they are popular or not.<sup>109</sup> The Court proceeded to hold that applying New Jersey's public accommodations law violated the Boy Scouts's First Amendment right of expressive association.<sup>110</sup>

## V. ANALYSIS AND IMPLICATIONS

The United States Supreme Court in *Dale* reaffirmed the constitutional protections against the government compelling a group to express or not express a certain belief.<sup>111</sup> In analyzing the First Amendment expressive association claim, the *Dale* Court also continued to use the *Roberts* framework of examining the nature of the associational right, the extent of the governmental infringement of that right, and the compelling state interest used to justify that right.<sup>112</sup> In examining each factor, however, the *Dale* Court's approach differed from the approaches used in *Roberts* and predecessor cases.<sup>113</sup> Whether these changes are simply an isolated departure or

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101. See *id.* at 653-54. (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)).

102. *Id.* at 654.

103. *Id.* at 654-55.

104. See *id.* at 655-56.

105. See *id.* at 656.

106. See *id.*

107. See *id.* at 656-57.

108. See *id.* at 661.

109. See *id.*

110. See *id.*

111. See *id.* at 647.

112. See *supra* notes 33-35, 85-86 and accompanying text.

113. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*,

whether they mark a significant shift in the way the Court analyzes First Amendment expressive association claims remains unclear in the wake of *Dale*.

### A. Nature of Associational Right

The *Dale* Court found that the purpose behind the Boy Scouts's activities was to instill values in young people.<sup>114</sup> The Court stated that such activities are expressive in nature.<sup>115</sup> The Court then looked to the nature of the Boy Scouts's view on homosexuality.<sup>116</sup> Although the Court determined that the Scout Oath and Law do not expressly mention sexuality or sexual orientation and that the terms "morally straight" and "clean" are not self-defining,<sup>117</sup> the Court deferred to the Boy Scouts' assertions that the organization teaches that homosexual conduct is not morally straight.<sup>118</sup> The majority noted that "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."<sup>119</sup>

According to this language, the Court appears to be adopting a subjective test for determining the expressive activity of an organization. Instead of independently reviewing the organization's policies, bylaws, and literature to make an objective determination of the nature of the group's expressive activity, the Court seems to accept the organization's assertions in its briefs of what the nature of its expressive activity is.<sup>120</sup> Moreover, a group is allowed to define its own expressive message, even in the course of the litigation itself.<sup>121</sup> As Justice Stevens stated in his dissent in *Dale*, such deference to an organization's assertion of what is the nature of its expression "is an astounding view of the law."<sup>122</sup> Justice Stevens declared that he was "unaware of any previous instance in which [the Court's] 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."<sup>123</sup> Justice Stevens's astonishment is not unfounded, given that the Court in both *Roberts* and *Rotary Club* looked to the bylaws of the organizations for proof of the nature of their expressions.<sup>124</sup> Giving deference to a litigant's assertions of what its expression is does not permit an independent review to ensure that what the litigant contends is not a pretext for discrimination.<sup>125</sup>

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468 U.S. 609 (1984).

114. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 649 (2000).

115. See *id.* at 650.

116. See *id.*

117. See *id.*

118. See *id.* at 651. Although the Court stated that it did not need to inquire further to determine the nature of the Boy Scouts's expressed views on homosexuality, the Court did look to position statements promulgated by the Boy Scouts to support its conclusion. See *id.*

119. *Id.* at 651.

120. See *id.*

121. See *id.* at 674-75. (Stevens J., dissenting) The dissent notes that the Boy Scouts issued the 1991 and 1993 position statements after *Dale*'s membership had been revoked. *Id.*

122. *Id.* at 686.

123. *Id.*

124. See *Roberts v. United States Jaycees*, 468 U.S. 609, 612-13 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539-41 (1987).

125. See *Dale*, 530 U.S. at 656 (Stevens, J., dissenting). "If 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

The majority's approach to examining expressive association claims places civil rights legislation on uncertain grounds because it shields a litigant's claim from judicial scrutiny.<sup>126</sup> It may now be possible for any organization that wants to discriminate on the basis of race, gender, or sexual orientation simply to say that their expressive message is a discriminatory one. For instance, if the Boy Scouts were to assert in a position statement today that its definition of "morally straight" precludes the admission of Jewish or African-American scoutmasters, would the Court continue to give the Boy Scouts the same deference that it did in *Dale*? If the Court has adopted a purely subjective test for determining the nature of an organization's expressive activities, then it is probable that the Court would also accept the Boy Scouts's assertions regarding its discrimination on the basis of religion and race. Thus, the *Dale* holding may have broad implications in the civil rights arena if other organizations will be given the same deference as the Boy Scouts were given in this case.

### *B. Extent of Governmental Infringement on Associational Right*

The *Dale* Court, in addition to deferring to the Boy Scouts's assertions regarding the nature of its expression, yielded to the Boy Scouts's view of what would impair its expression.<sup>127</sup> The *Dale* Court gave deference to the Boy Scouts's view that the presence of James Dale would force the organization to send a message that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.<sup>128</sup> Although the simple assertion that the presence of a member from a particular group would impair its message is not sufficient to demonstrate infringement of an associational right,<sup>129</sup> the Court found that Dale's openness about his sexuality provided sufficient evidence that Dale's presence would force the Boy Scouts to convey a message that it did not wish to send.<sup>130</sup>

In contrast, the *Roberts* Court refused to give deference to the Jaycees' claims that admitting women as full voting members would change the content of its message,<sup>131</sup> even though one of the organization's stated purposes was to "foster the growth and development of young men's civic organizations."<sup>132</sup> The Court declined "to indulge in the sexual stereotyping" underlying the contention that allowing women to vote would change the content of the organization's speech.<sup>133</sup> Additionally, in *Rotary Club*, the Court also did not give such deference to Rotary International's claim about the content of its expression.<sup>134</sup> Although the General Secretary of Rotary International testified that the exclusion of women results in an

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exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate non-expressive private discrimination, on the other hand." *Id.* at 687.

126. *See id.* "Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce." *Id.*

127. *See id.* at 651.

128. *See id.* at 653.

129. *See id.*

130. *See id.* at 653. The Court noted that Dale was a leader in the community who was open about his sexual orientation, the co-president of a gay and lesbian organization at college, and a gay rights activist. *Id.*

131. 468 U.S. 609, 627-28 (1984).

132. *Id.* at 612-13.

133. *Id.* at 628.

134. *See Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987).

“aspect of fellowship...that is enjoyed by the present male membership,”<sup>135</sup> the Court still found that admitting women did not significantly affect the ability to carry out the Rotary Clubs’ various purposes.<sup>136</sup>

Justice O’Connor’s concurring opinion in *Roberts* may help reconcile the Court’s disparate treatment of the Boy Scouts versus the Jaycees and Rotary International.<sup>137</sup> Justice O’Connor wrote that the key inquiry in determining whether forced inclusion of members of a particular group infringed on the organization’s First Amendment rights was whether the organization was primarily expressive or commercial in nature.<sup>138</sup> Justice O’Connor believed that associations characterized as commercial in nature should be subject to the rational basis test while those characterized as expressive should be given more constitutional protections.<sup>139</sup> While the *Roberts* majority adopted the sliding scale of associational interests as the form of review under the First Amendment,<sup>140</sup> Justice O’Connor’s expressive versus non-expressive associations test may help elucidate the nexus between the nature of the associational interests and the extent of the governmental interference of those interests.

The *Dale* Court compared Dale’s presence in the Boy Scouts to the inclusion of GLIB members marching behind a GLIB banner in a parade.<sup>141</sup> In *Hurley*, the Court found that a parade is inherently expressive, so the forced inclusion of a particular group marching behind a banner infringed on the right of the organizers not to express a particular view.<sup>142</sup> By comparing the Boy Scouts to the parade organizers, the Court viewed the organization as more expressive in nature.<sup>143</sup> In contrast, the Jaycees have a more commercial nature, as shown by its promotion of solicitation and management skills.<sup>144</sup> Thus, the deference given to the Boy Scouts, but not to the Jaycees or Rotary International, regarding both the nature of its expression and what would impair that expression is due to the Court finding the Boy Scouts a more expressive organization. If such deference is limited to organizations that are expressive rather than commercial in nature, then the implications of *Dale* may not be as sweeping as appears at first glance. The subjective test for the nature of the expressive activity and for what impairs that activity may only be applied to organizations that the Court finds more expressive than commercial.

### C. Compelling State Interest Used to Justify Infringement

The *Dale* Court held that New Jersey’s interest in eradicating discrimination on the basis of sexual orientation did not outweigh the severe intrusion on the Boy

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135. *Id.* at 541 (quoting App. to Juris. Statement G-52).

136. *See id.* at 548.

137. *See Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984) (O’Connor, J., concurring).

138. *See id.* at 633-34.

139. *See id.* at 638.

140. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41 (5th ed. 1995).

141. *See Dale*, 530 U.S. at 653-54 (comparing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)).

142. *See Hurley*, 515 U.S. at 568-70.

143. *See Dale*, 530 U.S. at 653-54. The *Dale* Court noted that “[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.” *Id.* at 650.

144. *See Roberts v. United States Jaycees*, 468 U.S. 609, 639 (1984) (O’Connor, J., concurring).

Scouts' rights of freedom of expressive association.<sup>145</sup> The Court, however, offered little explanation for why the balancing test weighed in favor of the Boy Scouts beyond stating that it was applying the same sort of analysis that it applied in *Hurley*.<sup>146</sup> The Court gave a cursory discussion of the importance of New Jersey's LAD in eradicating discrimination in comparison to the lengthy discussion of the importance of Minnesota's public accommodations statute in *Roberts*.<sup>147</sup>

In *Roberts* and *Rotary Club*, the Court found that public accommodations laws that sought to give women equal access to publicly available goods and services served a compelling state interest of the highest order.<sup>148</sup> The Court also determined that the organizations failed to demonstrate that the public accommodations laws imposed any serious burdens on the male members' freedom of expressive association.<sup>149</sup> The *Roberts* Court found that the public accommodations law "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."<sup>150</sup>

By affording the Boy Scouts deference as to how serious a burden LAD placed on them,<sup>151</sup> while not giving the Jaycees or Rotary International the same deference,<sup>152</sup> and by comparing *Dale* to *Hurley*'s analysis of how the state's interest in its public accommodations law did not outweigh the parade organizers' rights,<sup>153</sup> the Court appears to give the Boy Scouts such deference based on its expressive, rather than commercial, nature. Once again, by using a more subjective test in which the Court accepts the organization's own assertions of how severe the governmental intrusion is on its expressive associational rights, the Court allows organizations to bypass the compelling state interest requirement. Thus, Justice Stevens has strong reasons for his criticism that such deference, which shields a litigant from judicial scrutiny, will render civil rights legislation a nullity.<sup>154</sup>

## VI. CONCLUSION

*Dale* reinforced *Roberts*' associational interests review of First Amendment expressive associations claims. Nonetheless, in what may signify a substantial shift in First Amendment analysis, the *Dale* Court employed a subjective test in reviewing an organization's expressive associational rights. The *Dale* Court gave deference to an association's assertions regarding the nature of its expression, what impairs its expression, and the severity of the governmental intrusion. By giving organizations latitude in defining their rights of expressive association, the Court has handed discriminatory groups an escape hatch to avoid subjection to many civil

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145. See *Dale*, 530 U.S. at 659.

146. See *id.*

147. Compare *Dale*, 530 U.S. at 656-61, with *Roberts*, 468 U.S. at 623-26.

148. See *Roberts*, 468 U.S. at 624; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

149. See *Roberts*, 468 U.S. at 626; *Rotary Club*, 481 U.S. at 548-49.

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

151. See *Dale*, 530 U.S. at 653.

152. See *supra* notes 131-136 and accompanying text.

153. See *Dale*, 530 U.S. at 653-54.

154. See *id.* at 687 (Stevens, J., dissenting).

rights laws. Fortunately, this escape hatch may be limited to organizations that are expressive, rather than commercial, in nature. Consequently, the fight in future litigation under public accommodations laws will be in defining the nature of the discriminatory organization.

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