The Supreme Court's Latest Resolution of the Conflict between Freedom of Association and Public Accommodations Laws: Boy Scouts of America v. Dale and Its Implications In and Out of the Courtroom

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Notes

THE SUPREME COURT'S LATEST RESOLUTION OF THE CONFLICT BETWEEN FREEDOM OF ASSOCIATION AND PUBLIC ACCOMMODATIONS LAWS: BOY SCOUTS OF AMERICA V. DALE AND ITS IMPLICATIONS IN AND OUT OF THE COURTROOM

I. INTRODUCTION

In Boy Scouts of America v. Dale, the United States Supreme Court ended the legal battle between James Dale, an openly gay Assistant Scoutmaster, and the Boy Scouts of America. Dale was also the Court's latest effort to reconcile the conflict between a private organization's freedom to associate and a state's attempt to eradicate discrimination through a public accommodations law. The Court held in Dale that New Jersey's Law Against Discrimination which forced the Boy Scouts to admit James Dale violated the Boy Scouts' freedom of expressive association. In doing so, the Court allowed freedom of expression to be used as a successful defense to a state's public accommodations law. Reading Dale narrowly, the result of the case is definite: the Boy Scouts do have a right to exclude homosexuals. This Note contends, however, that the broad impact of Dale is yet to be seen both on the Court's approach to the freedom of expressive association and on the specific groups involved in Dale, the Boy Scouts of America and homosexuals.

Part II of this Note provides a brief background of the two conflicting legal issues in Dale, a private group's First Amendment right to freedom of association and the states' attempts to eliminate discrimination through

2. See generally Dale, 530 U.S. at 661 (holding that forcing Boy Scouts to admit James Dale and other homosexuals through state antidiscrimination law violates First Amendment freedom of expressive association). For a further discussion of the facts and holding of Dale, see infra notes 53-113 and accompanying text.
3. For a further discussion of the conflict between freedom of association and state public accommodations laws, see infra notes 12-52 and accompanying text.
4. For a further discussion of the facts of Dale and the majority's holding and reasoning, see infra notes 53-113 and accompanying text.
5. See Dale, 530 U.S. at 644 (holding that applying New Jersey's public accommodations law to force Boy Scouts of America to admit James Dale as gay Scoutmaster violates Boy Scouts' First Amendment right of expressive association).
6. For a further discussion of the aftermath of Dale, see infra notes 133-90 and accompanying text.

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modern public accommodations laws. 7 Part III analyzes the reasoning of the majority and dissenting opinions in Dale by examining the Court’s application of precedent in this area. 8 Finally, Part IV looks at Dale’s aftermath, specifically focusing on Dale’s possible impact on the Boy Scouts of America, homosexual individuals and gay rights advocacy groups. 9

II. BACKGROUND

Dale was not the first time that the United States Supreme Court faced a conflict between a private organization’s right to freedom of expressive association and a state public accommodations law. 10 Before discussing Dale, this Note will therefore briefly explain these two conflicting aspects of the law and the method the Court has prescribed to deal with this conflict. 11

A. Freedom of Association

Although the word “associate” does not appear anywhere in the text of the First Amendment, the Supreme Court recognized long ago in NAACP v. Alabama ex rel. Patterson 12 that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” 13 The

7. For a further discussion of the First Amendment rights to freedom of intimate and expressive association and the Court’s resolution of its conflict with modern public accommodations laws, see infra notes 12-52 and accompanying text.

8. For a further discussion and analysis of the majority and dissenting opinions in Dale, see infra notes 79-132 and accompanying text.

9. For a further discussion of the impact that Dale may have on the Boy Scouts of America, homosexual individuals and gay rights advocacy groups, see infra notes 138-90 and accompanying text.


11. For a further discussion of the conflict between freedom of association and public accommodations laws, see infra notes 12-52 and accompanying text.


13. Patterson, 357 U.S. at 460. Scholars recognize Patterson as the first case to explicitly recognize the right of expressive association. See, e.g., David E. Bernstein, The Right of Expressive Association and Private Universities’ Racial Preferences and Speech
Court views this right to a generally protected "freedom of association" in two distinct senses: first, the right to "freedom of intimate association" and second, the right to "freedom of expressive association."\footnote{14} 

Under the right to intimate association, the Court has concluded that "[i]n this respect, freedom of association receives protection as a fundamental element of personal liberty."\footnote{15} This right to intimate association covers a limited number of relationships including marriage, raising children and living with one's relatives.\footnote{16} Under freedom of expressive association, the Court has stated that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."\footnote{17} The "other individual liberties" are those activities protected by the First Amendment, including "speech, assembly, petition for the redress of grievances, and the exercise of religion."\footnote{18} 

In each case, the level of constitutional protection given to freedom of association will depend on whether intimate or expressive association is implicated.\footnote{19} The factors to be considered in determining whether a particular relationship is considered "intimate" or "expressive" include "size, purpose, policies, selectivity [and] congeniality . . . ."\footnote{20} 

\footnote{Codes, 9 Wm. & Mary Bill Rts. J. 619, 620 (2001) [hereinafter Bernstein, Expressive Association] (stating that "the Supreme Court first explicitly recognized the right of expressive association in protecting the NAACP against harassment by southern state governments"). The First Amendment states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Court has further recognized that "as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981).} 

\footnote{14. Roberts, 468 U.S. at 617-18 (emphasis added).} 

\footnote{15. Id. at 618. In giving the freedom of intimate association such a high degree of constitutional protection, the Court has concluded that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id. at 617-18.} 

\footnote{16. See id. at 619 (listing examples of certain relationships that "exemplify these considerations, and . . . suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection").} 

\footnote{17. Id. at 618.} 

\footnote{18. Id.} 

\footnote{19. See id. (explaining that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case").} 

\footnote{20. Id. at 620.}
B. Public Accommodations Laws

Contemporary public accommodations or antidiscrimination laws are rooted in the common law. The common law prohibited public employees from refusing to serve a customer without good reason. The common law prohibition, however, was too general and proved to be insufficient in many situations.

To counter this insufficiency, most states passed detailed antidiscrimination statutes that expanded upon the common law duty not to discriminate. These modern forms of statutory protection follow a consistent pattern. First, the statutes enumerate the persons or entities subject to the prohibition against discrimination. In doing so, these lists expand on the persons and entities that were subject to the common law prohibition. Second, the laws also depart from, and further expand upon, the common law by enumerating the groups or persons within the law's protection.

22. See id. ("At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer.") (quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 571 (1995)).
   As one of the 19th-century judges put it, the rule was that "the innkeeper is not to select his guests[;] he has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." Hurley, 515 U.S. at 571 (quoting Rex v. Ivens, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835) (alteration in original)).
23. See Romer, 517 U.S. at 627-28 (explaining that common law rule was general and did not specify protection for particular groups).
24. See id. at 628 (noting that states chose to pass detailed statutory schemes because Fourteenth Amendment did not give Congress power to eliminate discrimination in public places).
25. See id. (citing public accommodations laws in Denver and Boulder, Colorado, as examples of this consistent pattern). For a further discussion of New Jersey's version of these statutes, see infra notes 68, 70 and accompanying text.
26. See id. ("The laws first enumerate the persons or entities subject to a duty not to discriminate.").
27. See id. ("The list goes well beyond the entities covered by the common law.").
28. See id. (explaining that "[t]hese statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection"). According to one scholar:
   Federal antidiscrimination laws have expanded over the decades from the original focus on race, with lesser focuses on religion and sex, to include bans on discrimination on the basis of age, disability, pregnancy, marital status, and veteran's status. In state and local jurisdictions, antidiscrimination laws cover everything from sexual preference to political ideology to weight to appearance, to, incredibly, membership in a motorcycle gang. David E. Bernstein, Sex Discrimination Laws Versus Civil Liberties, 1999 U. Chi. Legal F. 133, 169 [hereinafter Bernstein, Sex Discrimination] (emphasis added). The statutes "have expanded beyond those groups that have been given heightened equal
used to make the duty not to discriminate concrete and provide guidance for those who must comply" with the statutes.29

C. The Inevitable Conflict

By ensuring access to a broad range of goods and services to an equally expansive list of individuals, public accommodations laws inevitably conflict with the First Amendment rights of proprietors, or groups, to decide with whom they will associate.30 Furthermore, many Americans believe in two conflicting principles underlying the conflict between freedom of association and public accommodations laws.31 First, that the government should not infringe upon civil liberties such as freedom of association.32 Second, that the government, however, must protect certain groups from discrimination.33

The leading case on the conflict between the First Amendment right to freedom of association and public accommodations laws is Roberts v. United States Jaycees.34 Specifically, Roberts presented a general approach for courts to follow when addressing this conflict.35 At issue in Roberts were the membership policies of the United States Jaycees, a non-profit protection scrutiny" by the Court. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 n.2 (2000). “Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology.” Id.


30. See William N. Eskridge, Jr., A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 Yale L.J. 2411, 2415 (1997) (“With the advent of vigorous antidiscrimination laws that incidentally restrict expression, the collision of communal communities is today often accompanied by a collision of constitutional commitments, between the liberty of one group to exclude and express its disapproval, and the desire of an excluded group for equal treatment.”); Nancy J. Knauer, “Simply So Different”. The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale, 89 Ky. L.J. 997, 1010 (2000) (“The reach of [public accommodations] laws ... is potentially limited by the First Amendment rights of the employer, landlord, merchant, or organization in question.”); Lauren J. Rosenblum, Note, Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws, 72 N.Y.U. L. Rev. 1243, 1243-44 (1997) (explaining that purpose of statutes is to ensure equal access to goods and services and that, in creating right of equal access, statutes inevitably conflict with First Amendment right of proprietors to select those with which they choose to speak and/or associate).

31. See Bernstein, Sex Discrimination, supra note 28, at 133 (discussing principles and explaining that they are “ultimately conflicting”).

32. See id. (noting that “many Americans believe that freedom of speech, freedom of association, and freedom of religion must be protected from infringement by the government ... ”).

33. See id. (explaining that many Americans also believe that government must “intervene in civil society in order to eliminate discrimination against a wide variety of protected groups ... ”).


35. Cf. Bernstein, Antidiscrimination Laws, supra note 10, at 91 (“Roberts quickly became the leading precedent in cases where constitutional defenses were asserted against the enforcement of antidiscrimination laws.”).
organization that limited its regular membership status to men between the ages of eighteen and thirty-five. The national organization of the Jaycees sanctioned two local chapters after they began admitting women as regular members. In response, the chapters filed charges of discrimination against the national organization alleging that excluding women from full membership violated the Minnesota Human Rights Act.

In addressing whether applying the Minnesota Human Rights Act to force the Jaycees to admit women infringed upon the Jaycees' freedom of association, Justice Brennan, writing for the majority, considered separately the effect of the Minnesota Human Rights Act on both the Jaycees' freedom of intimate and expressive association. In regards to intimate association, Justice Brennan observed that the local chapters at issue lacked the characteristics that would afford constitutional protection to the Jaycees' decision to exclude women. After concluding that the ap-

36. See Roberts, 468 U.S. at 614 (describing membership policies of United States Jaycees). Women were allowed only to obtain the status of an associate member. See id. (explaining that "associate membership [was] available to individuals or groups ineligible for regular membership, principally women and older men"). Associate members paid lower dues than regular members but were unable to "vote, hold local or national office, or participate in certain leadership training and awards programs." Id.

37. See id. (explaining that national organization imposed sanctions on St. Paul and Minneapolis chapters including denying chapters' members eligibility for awards and refusing to count their votes at national conventions).

38. See id. (stating that chapters filed charges of discrimination complaining that national organization's bylaws forbidding full membership to women violated Minnesota Human Rights Act). The pertinent part of the Minnesota Human Rights Act quoted by the Court reads: "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. at 614-15 (quoting MINN. STAT. § 363.03, subd. 3 (1982)). Furthermore, the term "place of public accommodation" is defined in the Act 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. at 615 (quoting MINN. STAT. § 363.01, subd. 18 (1982)).

39. See id. at 618 (explaining that Court would "consider separately the effect of applying the Minnesota statute to the Jaycees on . . . its members' freedom of intimate association and their freedom of expressive association").

40. See id. at 621 ("The undisputed facts reveal that the local chapters of the Jaycees are large and basically unselective groups."). Specifically, Justice Brennan observed that both the national organization and the local chapters recruited members and admitted them without inquiring into their backgrounds. See id. (finding that "neither the national organization nor the local chapters employ[ed] any criteria for judging applicants for membership" and that "new members [were] routinely recruited and admitted with no inquiry into their backgrounds"). Justice Brennan referred to the testimony of a local officer who stated that "he could recall no instance in which an applicant had been denied membership on any basis other than age or sex." Id. Earlier in his opinion, regarding the Jaycees' right to protection based on intimate association, Justice Brennan determined that "several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection." Id. at 620.
lication of the Minnesota statute did not violate the Jaycees' members' right to freedom of intimate association, Justice Brennan addressed whether the application of the statute to the Jaycees' members violated the organization's freedom of expressive association. After examining the activities and functions of the Jaycees, Justice Brennan determined that "in view of the various protected activities" that the Jaycees engaged in, the organization's right to expressive association was "plainly implicated." Justice Brennan stated, however, that the right to expressive association is not absolute. Specifically, Justice Brennan acknowledged that infringements on this right can 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." Applying this compelling interest test to the Minnesota Human Rights Act, Justice Brennan determined that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." Finally, Justice Brennan concluded that "even if enforcement of the Act cause[d] some incidental abridgement of the Jaycees' protected speech, that effect [was] no greater than [was] necessary to accomplish the State's legitimate purposes." 

41. See id. at 621-22 (turning to consider whether applying Minnesota Act infringes group's freedom of expressive association). Justice Brennan also explained the significance of the right to expressive association. See id. at 622 (recognizing that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

42. Id. Among the constitutionally protected activities that the Jaycees and its members engaged in were taking "public positions on a number of diverse issues" and "engag[ing] in a variety of civic, charitable, lobbying, [and] fundraising" activities. Id. at 626-27.

43. See id. at 623 (finding that right to expressive association is not absolute).

44. Id.

45. Id. Discussing the Act on its face, Justice Brennan noted that it did "not aim at the suppression of speech, [did] not distinguish between prohibited and permitted activity on the basis of viewpoint, and [did] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." Id. Justice Brennan further noted that "the Act reflect[ed] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." Id. at 624. Discussing the application of the Act to the Jaycees, Justice Brennan concluded that Minnesota had advanced its interests "in the least restrictive means of achieving those ends." Id. at 626. More specifically, Justice Brennan commented that there was no reason to believe that the application of the Act to the Jaycees would "impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views." Id. at 627. In reaching this conclusion, Justice Brennan explained that "the Act require[d] no change in the Jaycees' creed of promoting interests of young men, and it impos[ed] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." Id.

46. Id. at 628.
Three years later in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court addressed both a factual and legal issue almost identical to that in *Roberts*. Writing for the majority and looking to factors similar to *Roberts*, Justice Powell concluded that Rotary Clubs were not entitled to the constitutional protection afforded to intimate association. Turning then to Rotary Club’s freedom of expressive association, Justice Powell emphasized that “the evidence fail[ed] to demonstrate that admitting women to Rotary Clubs [would] affect in any significant way the existing members’ ability to carry out their various purposes.” Following Justice Brennan’s opinion in *Roberts*, Justice Powell found that the state had a compelling interest in eradicating discrimination against women and the Act at issue plainly served that interest. Therefore, he concluded that “the application of the . . . Act to California Rotary Clubs [did] not violate the right of expressive association.”

III. *Boy Scouts of America v. Dale*: The Supreme Court’s Resolution of the Latest Conflict

A. Facts and Procedural History

James Dale’s affiliation with the Boy Scouts of America began in 1978 when, at the age of eight, he joined the Monmouth Council’s Cub Scout Pack 142. In 1981, Dale became a Boy Scout and remained so until he was eighteen. Dale was an exemplary Scout and in 1988 he became an Eagle Scout, one of the highest honors a member can receive. In 1989, Dale applied for an adult membership in the Boy Scouts. The Boy Scouts approved his application for adult membership and he became an


48. See *Rotary*, 481 U.S. at 539 (framing issue as “whether a California statute that requires California Rotary Clubs to admit women members violates the First Amendment”).

49. See id. at 547 (concluding that Act in question did not interfere with right to private association).

50. Id. at 548.

51. See id. at 549 (referring to recognition in *Roberts* of State’s compelling interest to eradicate discrimination against women).

52. Id.


54. See id. (stating duration of Dale’s status as Boy Scout).

55. See id. (noting Dale’s accomplishments as member of Boy Scouts). James Dale also “earned 25 merit badges [and] was admitted into the prestigious Order of the Arrow.” Id. at 665 (Stevens, J., dissenting). The Scouts award the rank of Eagle Scout to only three percent of its members. See id. (Stevens, J., dissenting) (noting Dale’s accomplishments as member of Boy Scouts).

56. See id. at 644 (explaining background of Dale’s adult membership in Boy Scouts).
Assistant Scoutmaster. \(^{57}\) Around the same time, Dale began attending Rutgers University. \(^{58}\)

After he arrived at Rutgers, Dale, for the first time, acknowledged to himself and others, that he was gay. \(^{59}\) Dale also became involved in the Rutgers Lesbian/Gay Alliance, of which he later became co-president. \(^{60}\) In 1990, Dale attended a seminar that addressed the psychological and health needs of lesbian and gay teenagers. \(^{61}\) A newspaper covering the event interviewed Dale regarding his advocacy of role models for gay and lesbian teenagers. \(^{62}\) The newspaper later published the interview, along with a picture of Dale and a caption identifying him as the co-president of the Rutgers Lesbian/Gay Alliance. \(^{63}\) Within the same month that the article was published, Dale received a letter from the Monmouth Council revoking his adult membership. \(^{64}\)

By letter, Dale requested the reason for the revocation of his membership. \(^{65}\) Dale was informed that the Boy Scouts "specifically forbid mem-

\(^{57}\) See id. (stating background facts of case).

\(^{58}\) See id. (stating background facts of case).

\(^{59}\) See id. at 644-45 (explaining Dale's open acknowledgment of his homosexuality).

\(^{60}\) See id. at 645 (describing Dale's membership and status in Rutgers Lesbian/Gay Alliance).

\(^{61}\) See id. (stating background facts of case).

\(^{62}\) See id. (stating background facts of case).

\(^{63}\) See id. (explaining that published newspaper article identified Dale as president of Rutgers' Lesbian/Gay Alliance). The relevant part of the passage/interview reads:

"James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance . . . , said he lived a double life while in high school, pretending to be straight while attending a military academy.

"He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.

"I was looking for a role model, someone who was gay and accepting of me,' Dale said, adding he wasn’t just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends."

Id. at 689-90 (Stevens, J., dissenting).

\(^{64}\) See id. at 645 (stating that Dale received letter from Monmouth Council Executive, James Kay, revoking his adult membership). "The letter stated that membership in BSA ‘is a privilege’ that may be denied ‘whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.’" Id. at 665 (Stevens, J., dissenting).

\(^{65}\) See id. at 645 (noting that Dale wrote to James Kay requesting reason for Monmouth Council's decision). Dale also requested the permission to attend a review under the Monmouth Council Review Procedures. See Dale v. Boy Scouts of Am., 734 A.2d 1196, 1205 (N.J. 1999) (explaining that Dale was entitled to review under Monmouth Council Review Procedures), rev’d, 530 U.S. 640 (2000).
bership to homosexuals." In response to having his adult membership revoked, Dale filed a complaint against the Boy Scouts in New Jersey Superior Court. Dale alleged that, by revoking his adult membership, the Boy Scouts violated New Jersey's public accommodations law and New Jersey common law.

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts, holding that New Jersey's public accommodations law was not applicable because the Boy Scouts was not a place of public accommodation. The court also held "that, alternatively, the Boy Scouts [was] a distinctly private group" and, therefore, was "exempted from coverage under New Jersey's [public accommodations] law.

66. Dale, 530 U.S. at 645. According to Justice Stevens, "at that time, no such standard had been publicly expressed by the BSA." Id. at 665 (Stevens, J., dissenting).

67. See id. at 645 (stating background of Dale's litigation against Boy Scouts in New Jersey courts).

68. See id. (stating allegations contained in Dale's complaint). New Jersey's Law Against Discrimination (LAD) provides, in pertinent part:

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

N.J. STAT. ANN. § 10:5-4 (West 2001) (emphasis added). The LAD defines "a place of public accommodation" as including, but not limited to:

[A]ny tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seaside accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Id. at § 10:5-5(f).

69. See Dale, 530 U.S. at 645 (explaining ruling of New Jersey Superior Court's Chancery Division). For a further discussion of the definition of a "place of public accommodation" under the LAD, see supra note 68 and accompanying text.
Finally, the Chancery Division "concluded that the Boy Scouts' position [regarding] active homosexuality was clear and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader" through the public accommodations law.\footnote{Dale, 530 U.S. at 645. The LAD does not include or apply to "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private. . . ." N.J. STAT. ANN. § 10:5-5(l) (West 2001). The New Jersey Superior Court's Chancery Division also "rejected Dale's common-law claim holding that New Jersey's policy was embodied in the public accommodations law." Dale, 530 U.S. at 645.}

Although the New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common law claim, it held that New Jersey's public accommodations law did apply to the Boy Scouts and that the Boy Scouts did violate it.\footnote{Id. at 645-46.} Furthermore, the court rejected the Boy Scouts' constitutional defenses.\footnote{See id. at 646 (explaining holding of New Jersey Superior Court's Appellate Division).}

Affirming the judgment of the Appellate Division, the New Jersey Supreme Court held that the Boy Scouts was a place of public accommodation subject to the New Jersey Law Against Discrimination; that the Boy Scouts was not exempt from the statute; and that the Boy Scouts violated the statute when it revoked Dale's adult membership.\footnote{See id. at 646-47 (discussing New Jersey Supreme Court's findings regarding Boy Scouts' constitutional defenses).} The court then addressed the federal constitutional defenses that the Boy Scouts raised.\footnote{See id. (noting rejection of defenses).}

First, the court rejected the Boy Scouts' defense that forcing it to include

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70. Dale, 530 U.S. at 645. The LAD does not include or apply to "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private. . . ." N.J. STAT. ANN. § 10:5-5(l) (West 2001). The New Jersey Superior Court's Chancery Division also "rejected Dale's common-law claim holding that New Jersey's policy was embodied in the public accommodations law." Dale, 530 U.S. at 645.

71. Id. at 645-46.

72. See id. at 646 (explaining holding of New Jersey Superior Court's Appellate Division).

73. See id. (noting rejection of defenses).

74. See id. (explaining holding of New Jersey Supreme Court). An equally important, but easily overlooked aspect of the New Jersey Supreme Court's holding is that the court was the first state supreme court to hold that the Boy Scouts was a place of public accommodation. See Jacob M. Carpenter, Note, Dale v. Boy Scouts of America: Whether the Application of New Jersey's Public Accommodations Law, Forcing the Boy Scouts to Include an Avowed Homosexual, Violates the Scouts' First Amendment Freedom of Expressive Association, 52 MERCER L. REV. 745, 757 (2001) (noting novelty of New Jersey Supreme Court holding). Four other state supreme courts and a United States court of appeals have reached the opposite conclusion. See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) (concluding that Boy Scouts is not place of public accommodation); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 239 (Cal. 1998) (holding that Unruh Civil Rights Act's definition of "all business establishments of every kind whatsoever" was not applicable to Boy Scouts); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 405-06 (Kan. 1995) (concluding that Boy Scouts is not "place of public accommodation"); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352, 360 (Conn. 1987) (concluding that denying female opportunity to serve as Scoutmaster of Boy Scout troop did not deprive her of "accommodation"); Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469 (Or. 1976) (holding that Boy Scouts was not "place of public accommodation" under Oregon Public Accommodation Act); see also Dale, 530 U.S. at 657 n.3 (footnoting cases holding that Boy Scouts is not place of public accommodation).

75. See Dale, 530 U.S. at 646-47 (discussing New Jersey Supreme Court's findings regarding Boy Scouts' constitutional defenses).
Dale violated the organization's right to intimate association.76 Second, the court rejected the Boy Scouts' defense that forcing it to include Dale violated its right to expressive association.77 Third, the court determined that New Jersey had a compelling interest in eliminating discrimination and that the public accommodations law was a permissible way to accomplish that goal.78

B. Narrative Analysis

1. Majority Opinion

In a five-to-four decision, the United States Supreme Court reversed the decision of the New Jersey Supreme Court.79 Chief Justice Rehnquist

76. See id. at 646 (stating finding of New Jersey Supreme Court). Looking to the factors discussed in Roberts and Rotary Club, the New Jersey Supreme Court determined that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under freedom of intimate association." Dale v. Boy Scouts of Am., 734 A.2d 1196, 1221 (N.J. 1999), rev'd, 530 U.S. 640 (2000).

77. See Dale, 530 U.S. at 647 (discussing reasoning of New Jersey Supreme Court). The New Jersey Supreme Court observed that while the Boy Scouts did express a belief in moral values and that the purpose of the Boy Scouts' activities was to promote moral development, there was no evidence that one of the Boy Scouts' purposes was to promote the immorality of homosexuality. See Boy Scouts of Am., 734 A.2d at 1223-24, 1228 (holding that because Boy Scouts do not express views regarding homosexuality, applying LAD did not violate its freedom of expressive association).

78. See Dale, 530 U.S. at 647 (stating that court determined that New Jersey's public accommodations law was permissible way to accomplish State purposes). Specifically, the New Jersey Supreme Court explained that it was "unquestionably a compelling interest of [the] State to eliminate the destructive consequences of discrimination from our society." Boy Scouts of Am., 734 A.2d at 1227. Furthermore, the court found that the LAD achieved its purpose without regard to the Boy Scouts' viewpoint and that it abridged "'no more speech or associational freedom than is necessary to accomplish [its] purpose.'" Id. at 1228 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984)).

79. See generally Dale, 530 U.S. at 661 (reversing decision of New Jersey Supreme Court and holding that applying LAD to force Boy Scouts to include homosexuals violates First Amendment). Chief Justice Rehnquist delivered the opinion of the Court and was joined by Justices O'Connor, Scalia, Kennedy and Thomas. See id. at 642-44 (holding that applying LAD to force Boy Scouts to include homosexuals violated First Amendment freedom of association). Justice Stevens provided one of two dissenting opinions, with Justices Souter, Ginsburg and Breyer joining his opinion. See id. at 663 (Stevens, J., dissenting) (disagreeing with majority's holding and reasoning and arguing that Boy Scouts did not engage in expressive activity). Justice Souter wrote the other dissenting opinion that was joined by Justices Ginsburg and Breyer. See id. at 700-01 (Souter, J., dissenting) (agreeing with Justice Stevens' dissent but arguing that public opinion toward homosexuality should not be controlling factor in case). One scholar has argued that, while the Court split five-to-four, the decision "should have been a relatively easy one" and that the Court "had more difficulty reaching [the] result than it should have." Michael Stokes Paulsen, Scouts, Families, and Schools, 85 MINN. L. REV. 1917, 1919 (2001). The same scholar also stated that the fact that the Court split five-to-four "on an issue so close to the core of the First Amendment is, to say the least, dis-
framed the issue in Dale simply as "whether the application of New Jersey's public accommodations law violated the First Amendment."80 Looking immediately to Roberts, the majority recognized that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"81 This right, the majority emphasized, is necessary to prevent the majority of the people from forcing its views on groups wishing to express unpopular ideas.82

After discussing the right of expressive association, the majority discussed the types of government action that may unconstitutionally infringe on that right.83 Specifically, the Court stated that "[t]he forced inclusion of an unwanted person in a group infringes the group'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."84 "'[F]reedom of association[,]" the majority recognized, "'plainly presupposes a freedom not to associate.'"85

The Court noted that to fall within the protection of freedom of expressive association, a group must engage in public or private expressive association.86 In evaluating whether the Boy Scouts engaged in expressive

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80. Dale, 530 U.S. at 647.
81. Id. (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)). Citing multiple cases as precedent, the Roberts Court noted that the right to associate has long been recognized by the Court. See Roberts, 468 U.S. at 622 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09, 932-33 (1982); Larson v. Valente, 456 U.S. 228, 244-46 (1982); In re Primus, 436 U.S. 412, 426 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977)).
82. See Dale, 530 U.S. at 647-48 ("This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."); see also Roberts, 468 U.S. at 622 ("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.").
83. See Dale, 530 U.S. at 648 (noting that government actions infringing on freedom may take many forms). Specifically, the Court recognized that "'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire'" is an unconstitutional intrusion by the government. Id. (quoting Roberts, 468 U.S. at 623). The majority's reason for this conclusion is clear. Cf. id. (arguing that "'[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express'" (emphasis added).
84. Id. (citing N.Y. State Club Ass'n., Inc. v. New York City, 487 U.S. 1, 13 (1988)).
85. Id. (quoting Roberts, 468 U.S. at 623) (emphasis added).
86. See id. ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association' . . . whether it be public or private.").
activity, the majority examined the Boy Scouts' mission statement and also quoted the Scout Oath and Law. Based on these statements, Chief Justice Rehnquist found that "the general mission of the Boy Scouts is clear: 'to instill values in young people.'"

After explaining that the Boy Scouts do engage in expressive activity, the majority considered whether including James Dale as an Assistant Scoutmaster would significantly affect the Boy Scouts' ability to advocate private or public viewpoints. In examining this issue, the Court attempted to determine the Boy Scouts' view regarding homosexuality. The Boy Scouts claimed that homosexual conduct is inconsistent with the Scout Oath and Law. Specifically, the Boy Scouts contend that homosexual conduct is inconsistent with the terms "morally straight" and "clean." Moreover, the Boy Scouts asserted that it "teaches that homosexual conduct is not morally straight" and that it does "not want to promote homosexual conduct as a legitimate form of behavior." Although the Court went on to review other written evidence in the record, Chief Justice Rehnquist stated that the Court "accept[ed] the Boy Scouts' assen-

87. See id. (quoting Boy Scouts' mission statement). The Boy Scouts' mission statement states as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." Id. Moreover, the Scout Oath and Law describe the values that the Boy Scouts strives to instill. See id. (reasoning that Boy Scouts of America engages in expressive activity). The Scout Oath states: "[O]n my honor I will do my best [t]o do my duty to God and my country and to obey the Scout Law; [t]o help other people at all times; [t]o keep myself physically strong, mentally awake, and morally straight." Id. at 648-49. The full text of the Scout Law reads: "A Scout is Trustworthy, Obedient, Loyal, Cheerful, Helpful, Thrifty, Friendly, Brave, Courteous, Clean, Kind, Reverent." Id. at 649.

88. Id.

89. See id. at 650 (explaining that, because Boy Scouts of America does engage in expressive activity, Court "must determine whether the forced inclusion of Dale as an Assistant Scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints").

90. See id. (stating that Court was required to explore Boy Scouts' views toward homosexuality).

91. See id. (stating Boy Scouts' assertions).

92. See id. (summarizing Boy Scouts' allegation that homosexual conduct conflicts with terms in Scout Oath and Law). As the majority noted, neither the Scout Oath nor the Scout Law mention sexuality or a person's sexual orientation. See id. ("Obviously the Scout Oath and Law do not expressly mention sexuality or sexual orientation."). Furthermore, regarding the specific terms "morally straight" and "clean," the majority conceded that:

[they] are by no means self-defining [and that] [d]ifferent people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

Id. (emphasis added). For a further discussion of how the Boy Scouts define the terms "morally straight" and "clean," see infra note 123 and accompanying text.

93. Dale, 530 U.S. at 651.
In determining whether or not Dale’s forced inclusion would significantly burden the Boy Scouts’ desire not to “promote homosexual conduct as a legitimate form of behavior,” the majority determined that, just as [the Court] gives deference to an association’s assertions regarding the nature of its expression, [it] gives deference to an association’s view of what would impair [that] expression.” The Court did, however, recognize that Dale was one of a group of gay Scouts that were leaders in the gay community. The majority concluded, therefore, that if the Boy Scouts

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94. Id. Chief Justice Rehnquist noted that, because the record contained written evidence of the Boy Scouts’ position, the Court would look to it as instructive. See id. (referring to evidence of sincerity of Boy Scouts’ beliefs). The Court referred to written evidence in the form of position statements made by the Boy Scouts of America. See id. (quoting Boy Scouts’ position statements). First, the Court referred to a 1978 position statement, to the Boy Scouts’ Executive Committee, which was signed by the Boy Scout President and Chief Scout Executive. See id. (quoting 1978 position statement). Specifically, the Court focused on the following language from the position statement:

“Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

“A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.”

Id. at 651-52. Second, the Court referred to a 1991 position statement, which in the Court’s opinion supported the Boy Scouts’ current view. See id. at 652 (quoting 1991 position statement). That position statement read: “We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.” Id. Again, in a 1993 position statement, the Scouts stated that “[t]he Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.” Id. Finally, the Court noted that the Boy Scouts’ assertions in Dale regarding its position on homosexuality was similar to the Boy Scouts assertions regarding homosexuality in Curran v. Mount Diablo Council of Boy Scouts of America, 952 P.2d 218 (Cal. 1998). See id. at 652-53 (citing Boy Scouts’ public expression of views toward homosexuals in previous litigation as evidence of sincerity of Boy Scouts’ assertions that it does not approve of homosexual behavior).

95. Id. at 653. The Court was careful to note that an expressive association cannot “erect a shield to antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” Id.

96. See id. (“Dale, by his own admission, is one of a group of gay Scouts who have ‘become leaders in their community and are open and honest about their sexual orientation.’”). The Court also considered Dale’s role as co-president of the Rutgers’ Lesbian/Gay Alliance and the fact that he remained a gay rights activist. See id. (noting Dale’s active involvement in gay rights).
were forced to include Dale, it would send a message that it accepted homosexual conduct as a legitimate form of behavior.\textsuperscript{97}

Regarding this conclusion, the majority found \textit{Hurley v. Irish-American Gay, Lesbian \& Bisexual Group of Boston}\textsuperscript{98} illustrative.\textsuperscript{99} In \textit{Hurley}, the Court held that applying a Massachusetts public accommodations law to require private organizers of Boston's St. Patrick's Day parade to accept a gay rights group violated the First Amendment.\textsuperscript{100} The Court determined that forcing the Boy Scouts to admit Dale as an Assistant Scoutmaster was analogous to forcing the organizers of the parade to allow the \textit{Hurley} group to march behind its banner.\textsuperscript{101} Accordingly, the majority concluded that "the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."\textsuperscript{102}

In making this conclusion, the majority directly disagreed with the reasoning and conclusion of the New Jersey Supreme Court.\textsuperscript{103} The majority did so for three reasons.\textsuperscript{104} First, the majority intimated that associations are entitled to the protection of the First Amendment even if they do not associate for the purpose of promoting a particular message.\textsuperscript{105} All that is necessary, the majority argued, is that the association "merely engage in expressive activity that could be impaired . . . ."\textsuperscript{106} Second, although the Boy Scouts discourages Scout leaders from promoting views on sexual issues,

\begin{itemize}
  \item \textsuperscript{97} See id.
  \item \textsuperscript{98} 515 U.S. 557 (1995).
  \item \textsuperscript{99} See \textit{Dale}, 530 U.S. at 653 (examining whether Dale's presence in Boy Scouts would send message that Boy Scouts accepts homosexual behavior and using \textit{Hurley} as illustrative on this issue).
  \item \textsuperscript{100} See \textit{Hurley}, 515 U.S. at 559 (addressing "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey" and holding "that such a mandate violates the First Amendment"); see also \textit{Dale}, 530 U.S. at 653 (explaining briefly facts and issue addressed in \textit{Hurley}).
  \item \textsuperscript{101} See \textit{Dale}, 530 U.S. at 654 (analogizing Dale's presence in Boy Scouts to that of gay rights group marchers in Boston's St. Patrick's Day Parade).
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} See id. ("The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster . . . ."). The New Jersey Supreme Court reached its conclusion by deciding that "'Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.'" \textit{Id.} at 654-55.
  \item \textsuperscript{104} See id. at 655 (listing reasons for disagreeing with New Jersey Supreme Court).
  \item \textsuperscript{105} See id. (arguing that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment").
  \item \textsuperscript{106} Id. (emphasis added). Chief Justice Rehnquist also found that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." \textit{Id.} at 648.
\end{itemize}
the majority noted that the First Amendment protects the Boy Scouts' method of expression—teaching by example.107 Third, the majority explained that the First Amendment "simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"108 Furthermore, Chief Justice Rehnquist made the strong statement that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."109

The majority then assessed New Jersey's interests.110 Without mentioning exactly what those interests were, the majority easily concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."111

Concluding the majority opinion, Chief Justice Rehnquist noted that the majority was not guided by whether or not it believed that the Boy Scouts' antigay policy was right or wrong.112 Elaborating, he stated that, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive language."113

107. See id. at 655 ("If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief . . . ").

108. Id. In this case, Chief Justice Rehnquist contended that "[t]he Boy Scouts [took] an official position with respect to homosexual conduct, and that [was] sufficient for First Amendment purposes." Id.

109. Id. at 656. This statement was in response to Dale's claim that the Boy Scouts do not revoke the memberships of heterosexual members that disagree with the policy. See id. at 655 (discussing Dale's claim). Chief Justice Rehnquist not only pointed to relevant but pointed to evidence in the record that disputed Dale's claim. See id. at 655-56 n.1 (citing record evidence that, according to Boy Scout officials, any adult members who advocate that homosexual conduct is moral will not be entitled to membership).

110. See id. at 657 (noting that Court "recognized in cases such as Roberts and Durante that States have a compelling interest in eliminating discrimination against women in public accommodations"). Moreover, Chief Justice Rehnquist recognized that freedom of expressive association is not absolute, and can be overridden "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. at 648 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

111. Id. at 659. "That being the case[,]" Chief Rehnquist stated that "the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law." Id.

112. See 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 . . . . ").

113. Id. Finally, Chief Justice Rehnquist concluded that "the law . . . is not free to interfere with speech for no better reason than promoting an approved
2. Dissenting Opinions

In his dissent, Justice Stevens was quick to recognize that the New Jersey Supreme Court's construction of the term "place of public accommodation" has "given its statute a more expansive coverage than most similar states." Therefore, Justice Stevens, similar to Chief Justice Rehnquist, framed the question in *Dale* as "whether that expansive construction trenches on the federal constitutional rights of the Boy Scouts of America ...."

Most importantly, Justice Stevens opined that the Boy Scouts had only adopted an exclusionary membership policy and did *not* express a shared goal of expressing the immorality of homosexual conduct. Unlike the majority, which argued that an organization need only engage in an expressive activity, Justice Stevens argued that "[a]t a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a *clear and unequivocal view*." Justice Stevens' dissent, therefore, argued primarily that including Dale, and other homosexuals, would *not* significantly impair the Boy Scouts' ability to engage in any expressive activity.

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message or discouraging a disfavored one ...." *Id.* (quoting *Hurley* v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 579 (1995)).

114. *Id.* at 663 (Stevens, J., dissenting). Justice Stevens explained that "New Jersey 'prides itself on judging each individual by his or her merits' and on being 'in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.'" *Id.* (Stevens, J., dissenting) (quoting *Peper* v. Princeton Univ. Bd. of Trs., 389 A.2d 465, 478 (1978)). Justice Stevens briefly noted that he considered New Jersey's broad interpretation of its public accommodations law to fall within the states' right to experiment with "things social" and concluded that the Court, in "exercising its high power[,]" did not accord New Jersey, a "courageous State[,]" the respect it was due. *Id.* at 664 (Stevens, J., dissenting).

115. *Id.* at 663-64 (Stevens, J., dissenting). For a further discussion of how Chief Justice Rehnquist framed the issue in *Dale*, see *supra* note 80 and accompanying text.

116. See *id.* at 684 (Stevens, J., dissenting) (arguing that "[t]he evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality"). One scholar has argued that Justice Stevens' "formalistic approach to discerning the Scouts' organizational values ignores the possibility that the Scouts had never really had to focus on homosexuality until sued by Dale ...." Peter H. Schuck, *Diversity Demands Exclusivity*, Am. Law., Sept. 12, 2000, at 69. As the majority itself acknowledged, however, the Boy Scouts *had* already been sued for discriminating against homosexuals in a factual scenario similar to that in *Dale*. See *Dale*, 550 U.S. at 652 (noting that "throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality ...."); see also *Curran* v. Mount Diablo Council of Boy Scouts of Am., 952 P.2d 218, 219 (Cal. 1998) (stating facts of case and noting that plaintiff was former Eagle Scout who had application for Assistant Scoutmaster position declined because he publicly avowed that he was homosexual and believed it was moral).


118. See *id.* at 684 (Stevens, J., dissenting) ("[T]here is 'no basis in the record for concluding that admission of [homosexuals] will impede the [Boy Scouts']

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Moreover, Justice Stevens strongly opposed the majority’s deference to both the Boy Scouts’ assertions regarding its expressive view towards homosexuality and to the Boy Scouts’ views of what would significantly impair those expressions. In Justice Stevens’ view, the Court should have first reviewed whether the Boy Scouts was in fact expressing any message and, second, whether applying New Jersey’s Law Against Discrimination to force the Boy Scouts to admit homosexuals would significantly impair that message.

In conducting his analysis, Justice Stevens examined statements, documents and other factors related to the purpose of the Boy Scouts, including its mission statement and federal charter. Specifically, he disagreed with the majority’s insistence of giving “deference to an association’s assertions regarding the nature of its expression” and further giving “deference to an association’s view of what would impair its expression.” Justice Stevens went so far as to call the majority’s approach an “astounding view of the law.”

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, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand.

The Boy Scouts’ federal charter declares its purpose as:

119. See id. at 685 (Stevens, J., dissenting) (disagreeing with majority’s insistence of giving “deference to an association’s assertions regarding the nature of its expression” and further giving “deference to an association’s view of what would impair its expression”). Justice Stevens went so far as to call the majority’s approach an “astounding view of the law.” Id. at 686 (Stevens, J., dissenting). Justice Stevens also stated 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.” Id. (Stevens, J., dissenting). Furthermore, Justice Stevens found it “even more astonishing in the First Amendment area, because, as the majority itself acknowledge[d] ‘we are obligated to independently review the factual record.’” Id. (Stevens, J., dissenting). Justice Stevens argued that “[i]t is an odd form of independent review that consists of deferring entirely to whatever a litigant claims.” Id. (Stevens, J., dissenting). Finally, Justice Stevens cautioned, “unless one is prepared to turn the right to associate into a free pass of out of antidiscrimination laws, an independent inquiry is a necessity.” Id. at 688 (Stevens, J., dissenting).

120. See id. at 686 (Stevens, J., dissenting) (“[W]e must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State’s antidiscrimination law.”). Moreover, Justice Stevens believed “that inquiry requires [the Court’s] independent analysis, rather than deference to a group’s litigating posture.” Id. (Stevens, J., dissenting). In discussing the need for an independent analysis, Justice Stevens argued, inter alia, that if the Court deferred:

121. See id. at 666 (Stevens, J., dissenting) (quoting excerpts from Boy Scouts’ mission statement and federal charter). The Boy Scouts’ federal charter declares its purpose as:

to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916.

with the Boy Scouts’ contention that homosexual behavior is contrary to the requirements in the Scout Oath that a Scout remain “morally straight” and in the Scout Law that a Scout be “clean.” After quoting excerpts from various Scouting materials explaining the requirements of remaining “morally straight” and “clean,” Justice Stevens concluded that “[i]t [was] plain as the light of day that neither of these principles . . . [said] the slightest thing about homosexuality.” Justice Stevens also emphasized that Scouts were not encouraged to talk to their Scoutmaster about sexual matters and that Scoutmasters, in turn, were discouraged from answering Scouts’ questions relating to such matters.

122. See Dale, 530 U.S. at 667 (Stevens, J., dissenting) (explaining that to “bolster” its claim, Boy Scouts pointed to term “morally straight” in Scout Oath and word “clean” in Scout Law).

123. Id. at 668 (Stevens, J., dissenting). Justice Stevens went further saying, “Indeed, neither term in the Boy Scouts’ Law and Oath expresses any position whatsoever on sexual matters.” Id. at 668-69 (Stevens, J., dissenting). Regarding the term “morally straight,” Justice Stevens looked to the fact that:

The Boy Scout Handbook defines “morally straight” as such:

“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.”

Id. at 667 (Stevens, J., dissenting (citation omitted)). Regarding the term “clean,” Justice Stevens looked to the fact that:

As for the term “clean,” the Boy Scout Handbook offers the following:

“A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.

“You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can’t help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

“There’s another kind of dirt that won’t come off by washing. It is the kind that shows up in foul language and harmful thoughts. "Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.”

Id. at 667-68 (Stevens, J., dissenting).

124. See id. at 669 (Stevens, J., dissenting) (emphasizing that while Scouts are not forbidden from asking Scoutmasters questions of sexual nature, “Scoutmasters are, literally, the last person Scouts are encouraged to ask” and that, “[m]oreover, Scoutmasters are specifically directed to steer curious adolescents to other sources
Regarding the sponsorship of the Boy Scouts, Justice Stevens noted that multiple religious organizations, some of which do not view homosexuality as immoral, sponsor the Boy Scouts.\textsuperscript{125} Therefore, he concluded it was “even more difficult to discern any shared goals or common moral stance on homosexuality.”\textsuperscript{126}

\begin{footnotes}
\textsuperscript{125} See id. at 670 (Stevens, J., dissenting) (noting that “many diverse religious organizations sponsor local Boy Scout troops” and that “a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals . . . ”).

\textsuperscript{126} Id. (Stevens, J., dissenting). Justice Stevens also criticized the majority’s use of position statements issued by the Boy Scouts to “fill the void.” Id. at 671 (Stevens, J., dissenting). Justice Stevens specifically criticized the use of the position statement issued by the Boy Scouts in 1978. See id. (Stevens, J., dissenting) (noting that “when the entire 1978 letter is read, BSA’s position is far more equivocal . . . ”). Justice Stevens pointed to the following question and answer from that position statement as supportive of his argument:

“Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?”

“A. Yes, in the absence of any law to the contrary. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual’s employment upon the basis of homosexuality. In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it . . . ”

Id. at 672 (Stevens, J., dissenting). Justice Stevens then attacked the letter as not establishing any clear policy against homosexuality on four points. See id. (Stevens, J., dissenting) (“Four aspects of the 1978 policy statement are relevant to the proper disposition of the case.”). First, Justice Stevens argued that the letter “simply adopts an exclusionary membership policy” that is insufficient “by itself, to prevail on a right to associate claim.” Id. (Stevens, J., dissenting). Second, he contended that because the letter was never made public, it remained a “secret Boy Scouts policy.” Id. (Stevens, J., dissenting). Therefore, he stated that the policy of the Boy Scouts, at least as expressed, remained “one of tolerance, welcoming all classes of boys and young men.” Id. (Stevens, J., dissenting). Third, Justice Stevens maintained that the drafters of the letter “foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination” and that they “clearly provided that, in the event such
Justice Stevens also strongly disagreed with the majority's conclusion that Dale's "mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality..." Arguing that the majority's reliance on *Hurley* was erroneous, Justice Stevens noted as significant that "Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message." Justice Stevens' dissent concluded that unfavorable opinions "about homosexuals have ancient roots" and that these roots "have been nourished by sectarian doctrine." By creating a constitutional shield for policies that are a law conflicted with their policy, a Scout's duty to be 'obedient' and 'obe[y] the laws,' even if 'he thinks [the laws] are unfair' would prevail in such a contingency. *Id.* at 672-75 (Stevens, J., dissenting) (alterations in original). Finally, Justice Stevens noted that the "1978 statement simply says homosexuality is not 'appropriate'" and that it made "no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts." *Id.* at 673 (Stevens, J., dissenting). While Justice Stevens analyzed four other position statements issued by the Boy Scouts between 1991 and 1993 and relied upon by the majority, he simply stated that "[a]ll of them were written and issued after BSA revoked Dale's membership. Accordingly, they have little, if any, relevance to the legal question before this Court." *Id.* at 673-74 (Stevens, J., dissenting).

127. *Id.* at 692 (Stevens, J., dissenting).

128. *Id.* at 694-95 (Stevens, J., dissenting). Expanding on this argument, Justice Stevens conceded that "[i]t is true, of course, that some acts are so imbued with symbolic meaning that they qualify as 'speech' under the First Amendment." *Id.* at 695 (Stevens, J., dissenting). Justice Stevens contended, however, that "[a]lthough participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech." *Id.* (Stevens, J., dissenting). Finally, Justice Stevens concluded:

Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities. That cannot be, and never has been, the law.

*Id.* (Stevens, J., dissenting).

129. *Id.* at 699 (Stevens, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 192 (1986)). Specifically, Justice Stevens' comments regarding negative opinions of homosexuals, the relationship of those opinions to religious doctrine and the relevance of those opinions in cases such as *Dale* have found both support and criticism from judges and scholars. Compare *id.* at 660 (arguing that greater societal acceptance of homosexuality "is scarcely an argument for denying First Amendment protection to those who refuse to accept these views"), and Paulsen, supra note 79, at 1917 (calling Justice Stevens' dissent "stunningly bigoted" and "one of the most intolerant-of-religion opinions ever to appear in the U.S. Reports"), with *Sexual Orientation and the Law* 170 (Harvard Law Review Ass'n eds., 1990) (concluding that "discrimination on the basis of sexual orientation persists throughout American society and the American legal system"), and Eskridge, supra note 30, at 2416 (arguing that "antireligious prejudice has manifested itself in American history in ways not unlike antihomosexual prejudice").
a product of homosexual prejudice, Justice Stevens argued that the Court would only aggravate those prejudices.130

Justice Souter authored a brief dissent agreeing almost entirely with Justice Stevens.131 Regarding Justice Stevens' comments toward public opinions of homosexuality, however, Justice Souter stated that they should not to be a controlling factor in the case.132

IV. The Aftermath of Dale

Unlike the Court's prior freedom of association versus public accommodations law cases, the Court in Dale for the first time ruled that a public accommodations law was unconstitutional because it infringed on a group's right of expressive association.133 According to one scholar, Dale therefore "significantly reduced the threat that antidiscrimination laws once posed to constitutionally protected civil liberties."134 The decision in Dale certainly leaves some open questions, including what organizations will be entitled to the protection of freedom of expressive association.135 While some organizations will certainly benefit more than others, it is unclear what Dale's impact will be on the Court's approach to expressive association defenses.136 Part IV therefore concentrates on the three groups

130. See Dale, 530 U.S. at 700 (Stevens, J., dissenting) (arguing that harm caused by homosexual prejudice can only be aggravated by creation of constitutional protection for policies that are product of that prejudice).

131. See generally id. at 700-02 (Souter, J., dissenting) (joining Justice Stevens' dissent but noting that public attitudes toward homosexuals should not be controlling factor in case).

132. See id. at 701 (Souter, J., dissenting) (arguing that Court's "cognizan[ce] of . . . laudable decline in stereotypical thinking on homosexuality should not . . . be taken to control the resolution of this case").

133. See id. at 679 (Stevens, J., dissenting) (noting that, until Dale, 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"); see also Bernstein, Expressive Association, supra note 13, at 624 ("In Dale, the Supreme Court clearly held for the first time that the right of expressive association trumps an antidiscrimination law."); Carpenter, supra note 74, at 751 (explaining that in Dale, Court broke from trend set in previous cases and held, for first time, that public accommodations law was unconstitutional for infringing on group's right of expressive association).

134. Bernstein, Antidiscrimination Laws, supra note 10, at 88. One scholar argues that persons "who agree with the fundamental premise of the First Amendment— that government cannot be trusted to establish and fairly police the boundaries of acceptable speech, expressive association, and religious expression—can now rest a little easier." Id. at 139.

135. See id. at 126 (discussing Dale's impact on freedom of association and noting that "Dale did not clearly specify which organizations will receive constitutional protection on freedom of association grounds from antidiscrimination laws").

136. But see id. at 127 (arguing that "among expressive organizations, religious organizations will most likely be the primary beneficiaries of Dale"). According to one scholar, Dale "gives religious organizations newfound autonomy from certain antidiscrimination laws . . . ." Id. at 128. Regarding the expanded rights of religious organizations, the same scholar argues, for example, that Dale protects the right of church schools to fire unmarried female teachers or employees that
that will be the most impacted by Dale: the Boy Scouts of America, homosexual individuals and gay rights advocacy groups.¹³⁷

A. Impact on the Boy Scouts of America

The Boy Scouts of America achieved a clear legal victory in Dale.¹³⁸ On the other hand, in the court of public opinion and within the organization itself, its victory has not been as clear.¹³⁹ First, the publicity of the

become pregnant. See id. at 130 (arguing that “under Dale church schools have a constitutional right to fire teachers who become pregnant out of wedlock if sex outside of marriage is frowned upon by the sponsoring church”). But see Ganz v. Allen Christian Sch., 995 F. Supp. 340, 360 (E.D.N.Y. 1998) (refusing to grant defendant school’s motion for summary judgment because “[p]laintiff’s evidence . . . might lead a jury to find that the religious reason—premarital sex—for the termination is a pretext”); Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 808 (N.D. Cal. 1992) (denying defendant’s motion for summary judgment because although “defendants’ dislike of pregnancy outside of marriage stems from a religious belief . . . it does not automatically exempt the termination decision from Title VII scrutiny”); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 271 (N.D. Iowa 1980) (denying defendant’s resisted motion to dismiss and, in alternative, for summary judgment on plaintiff’s action under Title VII of Civil Rights Act of 1964 because even where defendant school’s religious code “truly constitutes a legitimate religious [bona fide occupation qualification], the law nonetheless requires that it not be applied discriminatorily on the basis of sex; that is, unequally to defendant’s male and female lay teacher employees”). The same scholar acknowledges that his example and conclusion are contrary to federal precedent. See Bernstein, Antidiscrimination Laws, supra note 10, at 130 (acknowledging that example is “contrary to holdings of three federal courts”).

¹³⁷. For a further discussion of the impact that Dale may have on the Boy Scouts of America, homosexual individuals and gay rights advocacy groups, see infra notes 138-90 and accompanying text.

¹³⁸. For a discussion of the facts of Dale and the majority’s holding and reasoning, see supra notes 138-113 and accompanying text.

¹³⁹. See Peter Ferrara, The Battle over the Boy Scouts; A Year After the Supreme Court Decision, It’s a Standoff, WKLY. STANDARD, June 11, 2001, at 21 (arguing that “[a]s with many court decisions, this was not the end but just the beginning of a culture war’’); David France, Scouts Divided, NEWSWEEK, Aug. 6, 2001, at 44, 46 (explaining that while recent polls suggest that most Americans agree with Court’s ruling, growing number of Americans do not approve of exclusionary policy); Andrew Jacobs, The Supreme Court: The Reaction; Victory Has Consequences of Its Own, N.Y. TIMES, June 29, 2000, at A28 (explaining that because of increased public tolerance toward gays, Boy Scouts’ victory may harm organization); Joyce Howard Price, Gay Critics Continue To Pursue Boy Scouts, WASH. TIMES, June 28, 2001, at A1 (explaining that, although Supreme Court ruled in Boy Scouts’ favor, groups are still lobbying against antigay policy); Anna Quindlen, The Right to Be Ordinary, NEWSWEEK, Sept. 11, 2000, at 82 (stating that on paper gay Scoutmaster (Dale) lost, but Scouting officials are ones that are taking beating); Patty Reinert, Gay Policy’s Fallout Lingers in Boy Scouts; Ban Mobilizes Critics a Year After Ruling, HOUSTON CHRON., June 24, 2001, at A1 (reporting that publicity surrounding case has motivated more people to speak out against Boy Scouts); Kate Zernike, Scouts’ Successful Ban on Gays Is Followed by Loss in Support, N.Y. TIMES, Aug. 29, 2000, at A1 (stating that following Supreme Court case, corporate and governmental support for Scouts has slipped markedly); 60 Minutes: The Boy Scouts; Policy of the Boy Scouts to Disallow Homosexuals in to Their Ranks, (CBS television broadcast, July 8, 2001) (asking “[d]id the Boy Scouts lose more than they gained when the Supreme Court . . .
Dale case has hurt the Boy Scouts’ ability to obtain funding and support from public and private groups. Furthermore, the case’s publicity has led to a possible backlash against the Boy Scouts’ antigay policy within the organization.

1. Loss of Public and Private Support

The list of public and private organizations questioning their support of Scouting is extensive. For example, one of the Boy Scouts’ most important contributors, the United Way, is beginning to withdraw its support and funding. The executive director of a United Way chapter stated that he was “stunned at how swiftly and strongly his board had acted to cut support to any Scout troops that did not sign a form saying they would not endorse the Scouts’ ban on gays.” Recently, at least at the local level, it seems that the efforts of United Ways may be working. For example, at least one local Boy Scout council, in an effort to avoid losing funding from the United Way, signed a letter agreeing not to discriminate.

ruled 5-to-4 that they had a legal right to exclude from their ranks what the Scouts call ‘avowed homosexuals’).

140. For a further discussion of the impact that the publicity of the Dale case has had on the Boy Scouts’ ability to raise funding, see infra notes 142-60 and accompanying text.

141. For a further discussion of the impact that Dale has had on the Boy Scouts internally, see infra notes 161-71 and accompanying text.

142. See France, supra note 139, at 47 (listing organizations and corporations that are distancing themselves from Boy Scouts); Nat Hentoff, Groups Wage War Against Boy Scouts in the Name of Political Correctness, PITTSBURGH POST-GAZETTE, June 15, 2001, at A27 (listing organizations that are opposing Boy Scouts’ policy).

143. See France, supra note 139, at 47 (stating that forty-four of most affluent United Way chapters blocked or changed funding to comply with own non-discrimination policies). According to the national office of the United Way, the organization contributes more than eighty-three million dollars a year to national Boy Scout councils. See Maria Newman, United Way to Continue Aid to Central Jersey Scouts, N.Y. TIMES, Aug. 31, 2001, at B5 (reporting annual amount United Way organization donates to national Boy Scout councils). According to another report, the number of United Ways withdrawing support is up to forty-six. See Scouting For All, List of United Ways That Have Withdrawn Their Funding of the BSA, available at http://www.scoutingforall.org/aaic/unitedway2.shtml (last visited Nov. 13, 2001) (calling on all United Ways to withdraw support for Boy Scouts and thanking those United Ways that have already withdrawn funding from Scouts).


145. See Newman, supra note 143, at B5 (reporting that, according to United Way officials, some local troops are adopting nondiscrimination policies to “appease their sponsors”).

146. See id. (explaining that United Way of Central New Jersey will continue to support local Scouting group after it signed letter agreeing not to discriminate against homosexuals). Furthermore, it was reported that the Central New Jersey Council is joining a number of councils that have admitted, although quietly, that they do not support the national policy. See id. (reporting that some other local troops are adopting nondiscrimination policies to satisfy sponsors). The United Way of Central New Jersey represents four hundred troops and provides a significant amount of money, $81,950, annually, as well. See id. (reporting that Central
Corporate America and the business community are also reconsidering their funding of Boy Scout troops. For example, organizations such as Levi Straus, Wells Fargo, Fleet Bank, CVS, the Philadelphia Foundation and the Communications Workers of America are distancing themselves from the Boy Scouts. These efforts by private corporations and businesses to force the Boy Scouts to change its national policy, however, have met opposition. Moreover, some corporations, such as Merrill Lynch, Textron and Procter Gamble, continue to fund Scouts.

Local and federal politics have also been affected. For example, some cities are questioning whether or not they should continue to support Scouting through the use of public facilities. Furthermore, local

147. See France, supra note 139, at 47 (noting multiple corporations that have cut back or stopped funding Scouts); Michael A. Wilson, Corporate America Must Rise in Support of Scouts, INSIGHT ON NEWS, Oct. 30, 2000, at 45 (explaining that corporate and business leaders have turned against Scouts).

148. See France, supra note 139, at 47 (listing corporations that are distancing themselves from Scouting along with other public and private Boy Scout supporters). While these businesses are representative of those that have stopped funding, the list is far more extensive. See, e.g., Scouting For All, LIST OF CORPORATIONS WHO REFUSE TO FUND THE BSA (listing businesses that have stopped funding Boy Scouts), available at http://www.scoutingforall.org/aacic/corplist.shtml (last visited Nov. 13, 2001). According to the Scouting For All website, the following corporations and businesses have stopped funding the Boy Scouts of America until it rescinds its antigay policy: Levi Strauss & Company, J.P. Morgan, American Airlines, Medtronic, Inc. of Minneapolis, MN, Wells Fargo of Portland Oregon, Portland General Gas & Electric of Portland Oregon, The Providence Journal, Textron, Fleet Bank, IBM Corporation and CVS/Pharmacy Stores. See id. (listing corporations that refuse to support Boy Scouts until Boy Scouts abandons its policy of excluding membership to homosexuals).

149. See Wilson, supra note 147, at 45 (arguing that corporate and business leaders have “caved in to... gay-orchestrated pressure and turned against the Boy Scouts”).

150. See France, supra note 139, at 47 (explaining that these companies “steadfastly support” Scouting).

151. For a further discussion of the reaction of local and federal politicians and groups, see infra notes 152-57 and accompanying text.

152. See France, supra note 139, at 47 (stating that Chicago, San Francisco, San Diego and other cities have stopped allowing Scouts to use public places such as parks and municipal sites for meetings). Often, these cities had no choice because they are required to comply with ordinances prohibiting antigay discrimination. See id. (reporting that numerous cities have “ordinances and policies long in place [that] prohibit public support of anti-gay discrimination there”). The response of some cities to the holding in Dale is not all that surprising. Cf. Brief of the Cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco, and Tuscon as Amici Curiae in Support of Respondent at 5, Boy Scouts of Am. v.
school districts, major contributors to scouting activities, have taken a second look at their policies toward the Boy Scouts. One of the most notable instances occurred in November 2000 when the Broward County School Board in Florida voted unanimously to ban Scouts from using public schools to hold meetings and recruitment drives. In March 2001, however, a federal district judge ruled that the Board's policy was discriminatory and enjoined the Board from enforcing it. In June 2001, in response to such efforts by school districts, both the United States House and Senate approved measures that would withhold federal money from any school or district that discriminates against the Boy Scouts. Senator Dale, 530 U.S. 640 (2000) (No. 99-699) (arguing that "[t]he interconnection between the Boy Scouts and the government provides cities and states with a particularly compelling interest in eradicating . . . discrimination"). The efforts of cities to try to force the Boy Scouts to change its national policy are causing some local troops to challenge the policy. See Eric Lipton, Local Scouting Board, Calling Gay Ban "Stupid," Urges End to National Policy, N.Y. TIMES, Feb. 27, 2001, at B3 (reporting that Greater New York Councils, Boy Scouts of America, announced decision to challenge national policy after City Council threatened to prohibit government agencies from sponsoring Scouts' Law Enforcement Explorers Program).

153. See Edward Wyatt, Education Bill May Omit Its Provision on Boy Scouts, N.Y. TIMES, June 17, 2001, § 1, at 22 (stating that school districts in at least a dozen cities have taken steps to limit funding and sponsorship of Boy Scouts). According to other reports, approximately 359 school districts in ten states have taken action against the Boy Scouts because of its national policy. See Price, supra note 139, at A1 (reporting that multiple groups, including school districts, are lobbying against Boy Scouts' national policy). According to another recent report, school boards have cut funding to the Boy Scouts at 4,418 schools across the United States. See Changing Values More Acceptance of Gays, CHARLESTON GAZETTE, Aug. 9, 2001, at 4A (reporting that loss in support was backlash against Court's ruling in Dale). In December 2000, the Chancellor of New York City schools issued an order prohibiting city schools from sponsoring Scout troops and forbidding the Boy Scouts from recruiting during school hours. See Anemona Hartocollis, Queens Board, in Revolt, Attacks Levy Over Restrictions on Boy Scout Access, N.Y. TIMES, Dec. 6, 2000, at B3 (reporting that Chancellor Harold O. Levy's order stated that Scouts' policy contradicts Board of Education rules prohibiting discrimination based on sexual orientation).

154. See Wyatt, supra note 153, at 22 (reporting that Broward County School Board "voted unanimously . . . to ban the Scouts from using public schools to hold meetings and recruitment drives").

155. See Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1311 (S.D. Fla. 2001) (enjoining "Defendants, their agents, employees, and successors . . . from preventing the Boy Scouts from using Broward County public school facilities and buses during the off school hours by reason of the Boy Scouts' membership policy").

156. See Wyatt, supra note 153, at 22 (explaining that measures "would withhold federal money from schools or districts that deny a fair opportunity to meet or that discriminate against the Boy Scouts or any youth group that prohibit the acceptance of homosexuals"); Ian Christopher McCaleb, Senate Approves Education Bill After Lengthy Debate, June 15, 2001 (reporting that Senate approved amendment by 52-48 vote), at http://www.cnn.com/2001/ALLPOLITICS/06/14/senate.education/index.html (last visited Nov. 14, 2001). In September 2000, the House also voted against legislation that would have revoked the Boy Scouts federal charter. See House Backs Boy Scouts in Vote Over Gay Issue, N.Y. TIMES, Sept. 14, 2000, at A21 (reporting that House solidly supported Scouts by voting 362-12 against effort to revoke Boy Scouts' federal charter); House Rejects Effort to Revoke
Helms of North Carolina, one of the amendments' sponsors, stated on the Senate floor that the measures were in response to the organized efforts of gays and lesbians.\footnote{157}

Finally, multiple religious organizations have denounced the Scouts' policy.\footnote{158} In January 2001, the Union of American Hebrew Congregations asked synagogues to stop sponsoring Scouts and encouraged congregants to pull their children out of Scouting.\footnote{159} On the Scouts' side, the Mormon and Roman Catholic Churches support the antigay policy.\footnote{160}

2. Disagreement Within the Boy Scouts

Along with the efforts of outside organizations to change the Boy Scouts' policy, within the Boy Scouts of America itself there is some disagreement over whether the organization should continue to enforce its antigay policy.\footnote{161} According to the organization's own polls, thirty-per-

\footnotesize{

\textit{Boy Scouts Charter}, Sept. 13, 2000 (reporting that legislation was offered by Representative Lynn Woolsey, Democrat from California), \url{http://www.cnn.com/2000/LAW/09/13/boyscouts.congress.02/index.html} (last visited Nov. 14, 2001). The Representative sponsoring the legislation stated that she knew “the value of Scouting” and believed that “Scouting should be available to all boys, not just some boys.” \textit{Id.} In response, a spokesman for the Boy Scouts stated that the Boy Scouts “were disappointed that this bill would even get considered . . . .” \textit{Id.} Republicans called the proposal an “attack on American values.” \textit{House Backs Boy Scouts in Vote Over Gay Issue, supra.}

157. See McCaleb, \textit{supra} note 156 (quoting Senator Jesse Helms).

158. See France, \textit{supra} note 139, at 46 (explaining that some religious organizations have asked Scouts to reconsider its policy).

159. See \textit{id.} (explaining that Union of American Hebrew Congregations issued “remarkable public denunciation”). Recently, the Jewish Community Center in Stamford, Connecticut ended a fifty-year relationship with the Boy Scouts by cutting its support for a local troop. \textit{See Jewish Center Cuts Its Ties to Boy Scouts, N.Y. Times, June 17, 2001, § 1, at 31} (explaining that Jewish Community Center ended its relationship with Boy Scouts because of Boy Scouts’ antigay policy).

160. See France, \textit{supra} note 139, at 46 (reporting that Mormon and Roman Catholic churches support 750,000 Scouts combined). According to one report, the United Methodists, Southern Baptists and Mormons believe the Scouts’ policy on homosexual membership is “in keeping with God’s position on homosexuality as a sin or abomination.” Marian Dozier, \textit{JCCS Break Ranks with Ban on Boy Scouts, Sun-Sentinel} (Fort Lauderdale, Fla.), Jan. 27, 2001, at 1B.

161. See France, \textit{supra} note 139, at 50 (reporting that some local troops are adopting their own nondiscrimination policies); Newman, \textit{supra} note 143, at B5 (reporting that some local troops are publicly disagreeing with national policy); Reinert, \textit{supra} note 139, at A1 (stating that defiant Scout troops are fighting policy from within); Richard Renaldi, \textit{Three Decades of Discrimination; Boy Scouts of America’s Discrimination Against Gays, Advo., Jan. 16, 2001, at 55} (reporting that thousands of Eagle Scouts, leaders and others involved in Scouting are protesting Boy Scouts’ national policy); see also \textit{Scouting For All, Some Scout Councils of the BSA Question and Some Defy Their Policy of Discrimination} (noting that some Scout Councils across country were opposed to policy even before \textit{Dale}), available \url{http://www.scoutingforall.org/aaic/defy.shtml} (last visited Nov. 14, 2001). In 1999, the Indiana Council of St. Paul, Minnesota requested that the Boy Scouts “establish a commission to study the BSA membership requirements and the role of the chartered organization in selecting leaders.” \textit{Id.}
cent of Scout parents do not support continuing the policy. One former Eagle Scout candidly stated that, while "Boy Scouts is an important organization[,] . . . they need to change their policy." In Spring 2001, the Boy Scouts lost a national figurehead when Steven Spielberg, a former Eagle Scout, resigned from the organization's advisory board.

Perhaps the most outspoken and organized revolt of Boy Scout members is Scouting For All, an organization founded in 1997 by Steven Cozza, a non-gay, life-long Scout. Recently, Scott Cozza, Steven Cozza's father and the President of Scouting For All, sent a letter and resolution to the Boy Scouts requesting, inter alia, that it change its national policy and admit anyone who was excluded in the past based on the antigay policy.

162. See France, supra note 139, at 46 (reporting percentage of Scout parents opposing national policy and noting that some members are "considering Boy Scouts no better than a whites-only country club").

163. Tony Freemantle, Houstonians Protest Scouts' Anti-Gay Policy, HOUSTON CHRON., Aug. 22, 2000, at A19. The same former Eagle Scout, Bruce Reeves, helped organize a protest in Houston in August 2000. See id. (quoting Mr. Reeves and noting he organized Houston protest). Regarding the attempt to change the Boy Scouts' policy, Mr. Reeves remarked, "if we need to get down and dirty with them to change [the policy], then that is what we will do." Id.

164. See France, supra note 139, at 46 (explaining that Spielberg ended his service on Advisory Board because he could not support group that practices discrimination); Spielberg: Boy Scouts Discriminate, Apr. 24, 2001 (stating that Steven Spielberg ended his ten year service on Boy Scouts' Advisory Board), at http://www.cnn.com/2001/SHOWBIZ/News/04/17/showbuzz/index.html (last visited Nov. 14, 2001). Spielberg stated that his reason for ending his service was that he could not serve a group that engaged in "intolerance and discrimination." France, supra note 139, at 46. Spielberg stated, however, that he would be happy to reconsider his role on the Advisory Board "once scouting fully opens its doors to all who desire the same experience that so fully enriched [him] as a young person . . . ." Spielberg: Boy Scouts Discriminate, supra.

165. See Scott Cozza, Scouting For All's Resolution to the Boy Scouts of America, As It Relates to Gay Youth and Adults, and Atheists in Scouting (stating that Scouting For All is organization inspired by courage of Steven Cozza, twelve year-old life-long Scout, who wanted to take stand against Boy Scouts' anti-gay policy), available at http://www.scoutingforall.org/aaic/resolution.shtml (last visited Nov. 14, 2001). Steven Cozza and his creation of Scouting For All became one of the central aspects to "Scout's Honor," a documentary about efforts to overturn the Boy Scouts' policy. See Edward Guthmann, Badge of "Honor": Documentary Captures Story of Steven Cozza, Who at Age 12 Took on the Boy Scouts' Anti-Gay Policy, S.F. CHRON., June 18, 2001, at E1 (explaining that documentary won multiple awards at Sundance Film Festival).

166. See Letter from Scott Cozza, President of Scouting For All, to Roy L. Williams, Chief Scout Executive, National Headquarters Boy Scouts of America (Aug. 20, 2001) available at http://www.scoutingforall.org/aaic/resolution.shtml (last visited Nov. 14, 2001) (quoting full text of resolution). The text of Scouting For All's resolution to Boy Scouts of America states, in pertinent part:

We . . . offer the Boy Scouts of America the following resolution to allow gay youth and adults and atheists into the Scouting program, as is the case with most of the other Scouting Associations throughout the world. We believe that the Boy Scouts of America must rescind its current policy of discrimination against gay youth, and adults and atheists. We believe that the Boy Scouts of America, pertaining to gay youth and adults, should return to its historic standards and allow the chartering
In August 2001, Gary Locke, Governor of the State of Washington and a former Eagle Scout, sent a positive letter to Scouting for All applauding its efforts to "make scouting accessible to all youth."\textsuperscript{167} While the efforts to change the policy are having an impact at the local level, the Boy Scouts continue to defend its policy and are using Dale for support.\textsuperscript{168} In January 2001, the Boy Scouts expelled seven Boy Scout and Cub Scout troops because their sponsoring organizations would not

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<td>We believe that in allowing the chartering organization and the scout units to decide their own membership, the Boy Scouts of America should also establish that no person(s) shall be denied membership based on religious belief, disability, race or sexual orientation.</td>
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<td>We believe that the Boy Scouts of America should allow those chartering religious organizations to continue to remain in Scouting even though their religious doctrine may reject those persons who are gay. In cases where youth or adults come out as gay or atheists, they should be allowed to relocate to another scout unit that accepts diversity of the human family. Should another scout unit not be available the scout could become a member of the BSA Lone Scout program. With respect to adults, they should be allowed to begin their own scout unit if another scout unit is not available in their community.</td>
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<td>We believe that all those who have been kicked out of the Boy Scouts of America because of their sexual orientation and/or belief, be granted amnesty and allowed to return as members.</td>
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Cozza, \textit{supra} note 165.

\textsuperscript{167} Letter from Gary Locke, Governor, State of Washington, to Robert Raketty, Northwest Regional Director, Scouting For All (Nov. 14, 2001), available at \url{http://www.scoutingforall.org/aaic/091901.shtml} (last visited Sept. 26, 2001). The pertinent part of the letter reads:

\begin{quote}
I applaud your organization's efforts to make scouting accessible to all youth. As an Eagle Scout, I believe that scouting deeply enriches the lives of our young people. It is a place where one enjoys camaraderie, develops leadership skills, and learn[s] the value of community service. Now [sic] one should be denied this valuable experience.
\end{quote}

\textit{Id.} On a more negative note, Steven Cozza was ridiculed at school after he started Scouting For All and in April 2001, received a death threat on his answering machine. See Guthmann, \textit{supra} note 165, at E1 (reporting incident and explaining that death threats have been problem).

\textsuperscript{168} \textit{See} \textit{Boy Scouts of America, An Open Letter to America's Families} (stating that United States Supreme Court reaffirmed Boy Scouts' right to establish its own membership standards), available at \url{http://www.scouting.org/excomm/60minutes/60minutes.html} (last visited Nov. 21, 2001). The full text of the letter reads:

\begin{quote}
We are writing to you to share some viewpoints about recent media coverage concerning the Boy Scouts of America.

This past June [2000], the U.S. Supreme Court reaffirmed the Boy Scouts of America's standing as a private organization with the right to establish its own membership and leadership standards. This historic decision has strengthened our resolve to remain a beacon of values and ideals.

Since our inception in 1910, the Boy Scouts of America has always taught youth the traditional values of the Scout Oath and Law. These values are consistent with the ideals embraced by most American families and are grounded in the tenets and teaching of the majority of the
abide by the antigay policy. According to a spokesman for the Boy Scouts, the organization will continue to expel troops that do not obey the policy. Regarding its national policy, the Boy Scouts continue to assert that "[i]nappropriate sexual behavior is inconsistent with the Scout Oath and Law," to acknowledge that they "respect other people's rights to hold differing opinions and [to] ask that [those people] respect [theirs]."

world's religions. We believe an avowed homosexual is not a role model for the values espoused in the Scout Oath and Law.

... From the beginning, Scouts are taught respect—respect for different ideas, customs, and cultures—and to recognize the right of individuals to subscribe to other beliefs. However, respect doesn't include forced inclusion of values, ethics, or morals that are contrary to your own.

Id. (emphasis added); see also Boy Scouts of America: Traditional Values and Standards (restating antigay policy), available at http://www.scouting.org/excomm/60minutes/60minutes.html (last visited Nov. 14, 2001). Furthermore, the Boy Scouts specifically asserted that, "[t]he members of the Boy Scouts of America enjoy a First Amendment right to freedom of association and to join together to pursue shared values, ideals, and goals. To advocate a set of standards with shared values, ideals, and goals is an affirmative act and is not discriminatory." Boy Scouts of America, BSA Stance, available at http://www.scouting.org/excomm/60minutes/60minutes.html (last visited Nov. 14, 2001) (emphasis added).

169. See William Claiborne, Scouts Expel Troops Whose Leaders Oppose Gay Ban, WASH. POST, Jan. 27, 2001, at A2 (noting that troops were among first expelled since Supreme Court case); France, supra note 139, at 50 (reporting that troops were forced to disband after they decided to accept gays as leaders); Scout Groups Rejected After Fighting Gay Policy, N.Y. TIMES, Jan. 28, 2001, § 1, at 16 (explaining that groups were rejected because sponsors challenged exclusionary policy).

170. See Shannon Brownlee, Should You Let Your Son Join the Boy Scouts? Boy Scouts of America’s Exclusion of Homosexual Members, REDBOOK, Apr. 1, 2001, 87, 89 (reporting that, according to Boy Scouts’ spokesman, any troops that disavow national policy will be expelled).

171. Boy Scouts of America, Traditional Values and Standards, supra note 168, at A1. Specifically, regarding the loss of United Way donations, a Boy Scout spokesman claimed that the losses have been made up by donations from other private groups and individuals. See id. (reporting that Boy Scouts’ spokesman stated that organization remains strong and financially healthy). Scouting does have its allies, a fact exemplified by the Boy Scouts’ Pittsburgh Council receiving an anonymous check in the amount of $1.5 million after the controversy over its policy became public. See Brownlee, supra note 170, at 89 (reporting also that there are signs that conservative groups are rallying around Boy Scouts to counter pressure to change policy). According to the head of the Sam Houston Area Council, Scouting is "'booming.'" See Reinert, supra note 139, at A1 (noting that same council recently raised $18 million for new camp and had annual budget approximately $900,000 larger than previous year). According to one report, in a recent poll, seventy-five percent of Americans had a favorable view toward the Boy Scouts. See Ferrara, supra note 139, at 22 (reporting also that eleven percent had unfavorable view toward Boy Scouts). Regarding membership numbers, the Boy Scouts has approximately 6.2 million boys, twenty-percent higher than in 1990. See id. (reporting recent membership numbers and relation to past numbers). One report, however, claims that, according to internal documents, membership in Cub and Boy Scouts in 2001 dropped 4.5% from 2000 and that in the Northeast region membership was down 7.8%. See France, supra note 139, at 47 (reporting internal documents showing membership decline).
B. Impact on Homosexual Americans

At first glance, the Court’s decision in Dale may be viewed as a direct assault on gay rights.\textsuperscript{172} Regarding homosexual \textit{individuals} this may be true.\textsuperscript{173} Regarding the rights of gay activist groups, however, the decision in Dale may become a victory, albeit one in disguise.\textsuperscript{174} This section therefore separately considers the impact on homosexual individuals and gay rights advocacy groups.\textsuperscript{175}

1. Impact on Homosexual Individuals

Reading the majority’s opinion, along with the Boy Scouts’ arguments, it seems that Dale’s exclusion was based on, and justified by, his “coming out” and becoming an \textit{avowed} homosexual, rather than his \textit{status} as a homosexual individual.\textsuperscript{176} By so viewing Dale, the majority of the Court clearly looked to Dale’s coming out as sending a message, contrary to that of the Boy Scouts, that homosexuality is \textit{not} immoral.\textsuperscript{177} While the

\textsuperscript{172} See Bernstein, \textit{Expressive Association, supra} note 13, at 620 (explaining that Dale is opposed by some because it “seems to deal a blow to gay rights”).

\textsuperscript{173} For a further discussion of the impact that Dale may have on homosexual individuals, see \textit{infra} notes 176-85 and accompanying text.

\textsuperscript{174} For a further discussion of the impact that Dale may have on gay rights advocacy groups, see \textit{infra} notes 186-90 and accompanying text.

\textsuperscript{175} For a further discussion of the impact that Dale may have on homosexual individuals, see \textit{infra} notes 176-85 and accompanying text. For a further discussion of the impact that Dale may have on gay rights advocacy groups, see \textit{infra} notes 186-90 and accompanying text.

\textsuperscript{176} See Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (emphasizing that Dale became leader in gay community and was honest about his sexual orientation). In fact, in its brief to the United States Supreme Court, the Boy Scouts argued that:

Boy Scouting makes no effort to discover the sexual orientation of any person. Its expressive purpose is not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting’s understanding of the Scout Oath and Law. \textit{Boy Scouting does not have an “anti-gay” policy, it has a morally straight policy.}

Brief for Petitioner at 6, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699) (emphasis added). Furthermore, the Boy Scouts argued that Dale would use his Scoutmaster position as a “bully pulpit” to “communicate ‘how bad or wrong’ Boy Scouting’s policy is.” \textit{Id.} at 21-22.

\textsuperscript{177} See Dale, 550 U.S. at 653 (finding that Dale’s presence in Boy Scouts would “send a message” that Boy Scouts accepts homosexual behavior). The argument that an openly gay individual sends a message that homosexuality is not immoral finds support even among the gay community. \textit{Cf.} Knauer, \textit{supra} note 30, at 1060 (noting that “pro-gay... organizations agree that the openly gay individual sends a message of gay pride”). It also finds support among scholars, one of whom has suggested that, “[i]n the Boy Scouts, ‘I’m gay’ sends a message about the speaker’s views regarding the morality of homosexuality and contradicts the Boy Scouts’ own expressive message.” \textit{Id.} at 1045. The same scholar notes that “[i]n reality, a public avowal of homosexuality signals a propensity for sodomy and suggests that the speaker, in light of his openness, does not consider homosexuality to be immoral or shameful.” \textit{Id.} Finally, the same scholar argues that publicly avowing that one is a homosexual “will not simply be a statement of identity until...
Court's holding may have been correct based on the facts of Dale, the Court's reasoning may have negative social repercussions, especially for homosexual individuals.178

Similar to religious beliefs, and unlike other personal characteristics such as sex, race and ethnicity, a person's sexual orientation is not readily apparent.179 Because of this, a person's sexual orientation only becomes identifiable when the person voluntarily, or in some cases involuntarily, exposes it.180 Therefore, to a homosexual individual, "coming out is a necessary prerequisite to claiming identity as a homosexual citizen."181

The danger of the majority's reasoning in Dale is that if homosexuals are aware that their coming out is not viewed as part of their identity or status, but rather as a message that can cause them to be excluded from certain groups or accommodations, they may be tempted to hide their identity.182 This fear of coming out has clear negative consequences to the individual's self-esteem, well-being and emotional adjustment.183 Furthermore, and equally important, there are negative social consequences, such as societal misunderstanding of, or even anger toward, homosexuals.184 As one scholar has correctly argued, "[s]omething culturally good is lost when fine people live in such fear of nonconformity, and something culturally dangerous is instantiated if the majority's values become universal by force rather than persuasion."185

the mainstream political discourse no longer debates the legitimacy of homosexual subjects, relationships, and identities." Id.

178. For a further discussion of the impact that Dale may have on homosexual individuals, see infra notes 179-85 and accompanying text.

179. See Dale Carpenter, Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach, 85 MINN. L. REV. 1515, 1551 (2001) (noting that, unlike skin color, homosexuality is not observable); Eskridge, supra note 30, at 2418 (explaining that, unlike sex, race, and ethnicity "[a]t the most superficial level, religion and sexual orientation are usually not apparent to casual observation . . .").

180. See Eskridge, supra note 30, at 2419 (explaining that sexual orientation is only revealed by person's speech or sexual conduct).

181. Knauer, supra note 30, at 1035.


183. See id. at 121 ("Perhaps the greatest negative effect the closet has on individual gays and lesbians is to their emotional and psychological well-being."). As at least one scholar has noted, one of the most potent consequences of remaining in the closet is the exceedingly high suicide rates for gay and bisexual teenagers. See Eskridge, supra note 30, at 2444 (explaining that suicide rates illustrate "suffocating effects of the closet").

184. See Eskridge, supra note 30, at 2443-47 (discussing social costs of suppressing identity speech).

185. Id. at 2445.
2. Impact on Gay Rights Groups

While *Dale* may have a negative impact on the rights of homosexuals as individuals, *Dale* may become a victory for the advocacy of gay rights through gay rights groups and organizations.186 Just as openly identifying oneself as a homosexual is important to the personal development of the homosexual individual, finding a safe place to discuss that self-identification is equally important.187 As at least two scholars have noted, "'from the beginnings of the gay civil rights movement, gay organizations have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy . . . . Even groups that are not exclusively gay would resist having heterosexuals in leadership positions.'"188 It is not surprising, therefore, that Gays and Lesbians for Individual Liberty, an organization promoting societal tolerance and acceptance of homosexuals, filed an amicus curiae brief on behalf of the Boy Scouts.189 Following the holding in *Dale*, gay advocacy groups, like other groups seeking uniform membership and leadership, can feel safe that government intervention with their membership and/or leadership criteria will not be tolerated.190

V. Conclusion

Reading *Dale* narrowly, the result is overtly clear: the Boy Scouts of America cannot be forced to include avowed homosexuals among its members.191 Reading *Dale* broadly and in the long term, however, the

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186. See Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639, 1667 (2001) (explaining that *Dale* may be viewed as victory to gay organizations).

187. See id. (explaining importance for some gay groups to limit membership and leadership to persons with similar backgrounds and beliefs).

188. Id. (quoting Carpenter, *supra* note 179, at 1550) (alteration in original).

189. See generally Brief Amicus Curiae of Gays and Lesbians for Individual Liberty in Support of Petitioners, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699) (arguing in Boy Scouts' favor to reverse decision of New Jersey Supreme Court). Specifically, the organization argued that denying the Boy Scouts the right to express its views through membership selection "endangers the rights of all Americans, including gay Americans." *Id.* at 3 (emphasis added). Arguing generally for the preservation of expressive association, Gays and Lesbians for Individual Liberty asserted that, "[a]s majority opinion often disfavors gay establishments, it is vital to preserve freedom of association so that local governments will not attempt to use their power to discourage gays from congregating." *Id.* at 11.

190. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group'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."); *id.* (finding government actions that intrude on organization's structure or affairs unconstitutional).

191. For a further discussion of the facts of *Dale* and the majority's holding and reasoning, see *supra* notes 53-113 and accompanying text.
real victor remains to be seen. While the Boy Scouts achieved a clear victory in the Supreme Court, it may experience a different fate in the court of public opinion.

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192. For a further discussion of the impact that Dale may have on the Boy Scouts of America, homosexual individuals and advocacy groups, see supra notes 138-90 and accompanying text.

193. For a further discussion of Dale's impact on how the Boy Scouts' policy is viewed in the court of public opinion and within the Boy Scouts itself, see supra notes 138-71 and accompanying text.