CASENOTE

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

In *Dale v. Boy Scouts of America*,[1] the United States Supreme Court held that the application of a New Jersey public accommodations law, forcing the Boy Scouts to extend membership to an avowed homosexual and gay rights activist, violated the Boy Scout's First Amendment right to freedom of expressive association.[2] The Court held New Jersey's law burdens the Boy Scouts' right to oppose homosexual conduct, and New Jersey's interest in curbing discrimination does not justify the intrusion on the Boy Scouts' right to freedom of expressive association.

I. FACTUAL BACKGROUND

In 1978, at the age of eight, James Dale ("Dale") joined the Monmouth Council's Cub Scout Pack 142. In 1981 Dale became a Boy Scout and

1. 120 S. Ct. 2446 (2000).
2. *Id.* at 2449.

eventually earned the rank of Eagle Scout, one of scouting's highest honors. In 1989 Dale began college at Rutgers University. At that time he applied for adult membership with the Boy Scouts of America ("Boy Scouts") and became an assistant scoutmaster.[3]

While at Rutgers, Dale openly admitted, for the first time, that he was gay. Dale became copresident of the Rutgers University Lesbian/Gay Alliance. In July 1990 Dale attended a seminar that discussed the psychological and health needs of gay teenagers. After interviewing Dale at the seminar, a newspaper published the interview and included a photograph of Dale. The photograph's caption identified Dale as the copresident of the Lesbian/Gay Alliance. Later that month, Monmouth Council Executive James Kay revoked Dale's adult membership. Kay explained to Dale that the Boy Scouts "specifically forbid membership to homosexuals."[4]

Demanding to be reinstated, Dale filed a complaint against the Boy Scouts alleging that the Boy Scouts, as a place of public accommodation, violated New Jersey's Law Against Discrimination ("LAD") by revoking his membership and expelling him from his position of Assistant Scoutmaster.[5] The trial court granted summary judgment for the Boy Scouts, holding: (1) LAD does not apply to the Boy Scouts because the Boy Scouts is not a "place of public accommodation;"[6] (2) the Boy Scouts met the statutory exclusion from LAD because it was an "institution . . . which is in its nature distinctly private;"[7] and (3) the Boy Scouts "First Amendment freedom of expressive association rights prevent[ed] government from forcing them to accept [Dale] as an adult leader-member" because the Boy Scouts has historically believed that homosexual conduct is morally wrong.[8] Therefore, to allow Dale, a known homosexual, to serve as an adult leader would be "absolutely antithetical to the purpose of Scouting."[9]

The Superior Court of New Jersey, Appellate Division, reversed and remanded.[10] The court held: (1) the Boy Scouts is a place of public accommodation under New Jersey's LAD; (2) by expelling Dale and depriving him of a public accommodation, the Boy Scouts violated LAD; and (3) applying LAD to prohibit the Boy Scouts from excluding

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3. *Id.* at 2449.
4. *Id.*
5. Dale v. Boy Scouts of America, 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 293.

homosexuals does not infringe upon the Boy Scouts' freedom of expressive association[11] or its freedom of intimate association.[12] The New Jersey Supreme Court affirmed the decision of the Appellate Division.[13]

The United States Supreme Court granted the Boy Scouts' petition for certiorari to determine whether applying New Jersey's LAD violated the Boy Scouts' First Amendment right of expressive association.[14] The Court examined the issue in three steps and held that the Boy Scouts' freedom of expressive association had been violated.[15] Therefore, the Court reversed the judgment of the New Jersey Supreme Court and remanded the case.[16]

II. LEGAL BACKGROUND

Though freedom of association is not expressly recognized in the Federal Constitution, such a right "may be inferred from other rights and protections guaranteed by the constitution."[17] In the 1958 case of *NAACP v. Alabama ex rel. Patterson*,[18] the Court first recognized that freedom of association is protected by the Constitution.[19] In *Patterson* the NAACP was held in contempt by an Alabama state court when the NAACP refused to disclose a complete list of its members to the court.[20] However, the United States Supreme Court noted that forcing the NAACP to disclose a complete list of its members could cause some members to leave the group, as well as causing others not to join.[21] Thus, because the State's order could prevent the NAACP members from pursuing a "collective effort to foster [their] beliefs,"[22] the Court ruled that the State's order violated the NAACP's freedom of association.[23] Freedom of association was deemed "an inseparable aspect of 'liberty'

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11. *Id.* at 274.
12. *Id.* at 286.
13. Dale v. Boy Scouts of America, 734 A.2d 1196, 1230 (1999).
14. 120 S. Ct. at 2449.
15. *Id.* at 2457.
16. *Id.* at 2458.
17. *Dale*, 706 A.2d at 285.
18. 357 U.S. 449 (1958).
19. 16A AM. JUR. 2D *Constitutional Law* § 539 (1998) ("It is generally conceded that the right of association may be traced to Justice Harlan's opinion for the Supreme Court in *NAACP v. Alabama*. In a number of prior opinions, however, the Supreme Court had mentioned, or had hinted in some rather vague way, that a 'right of association' existed." A list of those prior cases can be found in 16A Am. Jur. 2d § 539 n.62.
20. 357 U.S. at 451.
21. *Id.* at 462-63.
22. *Id.*
23. *Id.* at 462.

assured by the Due Process Clause of the Fourteenth Amendment."[24] The State failed to show an interest sufficient to justify suppressing the NAACP's right to associate.[25]

Seven years later in *Griswold v. Connecticut*,[26] the Supreme Court extended the freedom of association to intimate relationships, including family relationships.[27] The Court held that a Connecticut law that prohibited the use of birth control impinged upon a married couples' freedom of association.[28] The Court noted that although freedom of association is not mentioned explicitly in the Constitution,[29] association in certain contexts is a form of expressing one's opinion[30] and "[t]he right of association [is] contained in the penumbra of the First Amendment."[31]

The Court applied the freedom of association against a state's public accommodations law in the 1984 decision of *Roberts v. United States Jaycees*.[32] In *Roberts* a Minnesota Act prohibited gender discrimination in places of public accommodation.[33] When two local Jaycees chapters admitted a woman, the Jaycees' national organization threatened to revoke the two chapters' charters. The two chapters filed discrimination charges against the national organization. The national organization argued that the Act would, in essence, force them to admit women, which violated their constitutional freedom of association rights.[34]

The Court in *Roberts* expressly distinguished between two forms of association: (1) intimate association, and (2) expressive association.[35]

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24. *Id.* at 460.
25. *Id.* at 465.
26. 381 U.S. 479 (1965).
27. *Id.* at 485-86.
28. *Id.*
29. *Id.* at 482.
30. *Id.* at 483.
31. *Id.* at 484; *see also* Stephen P. Warren, Note, *Of Merit Badges and Sexual Orientation: The New Jersey Supreme Court Balances the Law Against Discrimination and the Freedom of Association in Dale v. Boy Scouts of America*, 30 SETON HALL L. REV. 951, 960 n.57 (2000).
32. 468 U.S. 609, 612 (1984); *see also* Cara J. Frey, *Hate Exposed to the Light of Day: Determining the Boy Scouts of America's Expressive Purpose Solely From Objective Evidence*, 75 WASH. L. REV. 577, 578, 583-87 (2000) (referring to the *Roberts* case as the beginning of the "Roberts trilogy," a line of three cases that establish the framework for balancing the right to be free from discrimination versus a group's right to associate. The other two cases (discussed *infra*) are *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988)).
33. 468 U.S. at 614-15 (citing MINN. STAT. § 363.03, subd. 3 (1982)).
34. *Id.*
35. *Id.* at 617-18.

Both the freedom of intimate association and the freedom of expressive association are guaranteed by the Constitution as fundamental to personal liberty.[36] Pertaining to intimate association, a group is more likely to be afforded constitutional protection if the group is, among other things, small, selective, and seclusive.[37] The Court ruled that because the Jaycees is a large and primarily unselective (except for age and sex) group, it is not protected under an intimate association claim.[38]

Turning to expressive association, the Court stated 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."[39] Forcing a group to accept a member clearly intrudes on that group's affairs.[40] However, the State may impinge upon a group's right to associate for expressive purposes if the State's regulations "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[41]

Applying the facts of *Roberts*, the Court ruled that the goal of the Act was not to hinder a group's expression,[42] that the Act served a compelling state interest of eliminating discrimination,[43] and that the State "abridge[d] no more speech or associational freedom than [was] necessary to accomplish [its] purpose."[44] Therefore, the Court found that the Act, although forcing the Jaycees to allow females to become members, was valid.[45]

The Supreme Court reapplied the factors from *Roberts* in the 1987 case *Board of Directors of Rotary International v. Rotary Club of Duarte*.[46] However, the Court added that if a group is not forced to "abandon or alter" one of its activities by including certain members, then that group's exclusionary policy will not be constitutionally protected.[47] In deciding whether a California statute violated the First

36. *Id.* at 618.
37. *Id.* at 620.
38. *Id.* at 621.
39. *Id.* at 622.
40. *Id.* at 623.
41. *Id.*
42. *Id.* at 623-24.
43. *Id.* at 624.
44. *Id.* at 629.
45. *Id.*
46. 481 U.S. 537 (1987).
47. *Id.* at 548.

Amendment by requiring Rotary Clubs to admit female members, the Court held that the Duarte Rotary Club ("Club") was not afforded intimate association protection because of its large size, its visuality in public, and its inclusive rather than exclusive membership policy.[48] The Club was not afforded expressive association protection because it failed to prove that the inclusion of women would affect the Club's existing members from carrying out their various purposes.[49] Nor did the inclusion of women force the Club to abandon any of its goals or activities.[50] In addition, the Court remarked that even if the State infringed slightly on the Club members' right to expressive association, such an infringement was justified by the State's compelling interest to eliminate discrimination against women.[51]

In the following year, the Court in *New York State Club Ass'n v. City of New York*[52] followed the above precedents, but added that a group's exclusionary policy must be connected with its ability to carry out its expressive purposes.[53] In this case, New York City amended a law to prevent discrimination in private clubs that are essentially public in nature.[54] The New York State Club Association claimed that the law violated the First and Fourteenth Amendments.[55] The Supreme Court disagreed.[56]

The Court noted that the following factors were significant in showing that intimate association protection would not be afforded to all clubs: (1) some of the clubs were comparable in size to the groups in *Roberts* and *Rotary;* (2) the clubs provided services to nonmembers; and (3) the clubs received payments from nonmembers.[57] Even though "a considerable amount of private or intimate association [may occur] in such a setting, . . . that fact alone does not afford [a club] constitutional immunity to practice discrimination" barred by statute.[58] In addition, even if some clubs may qualify for protection under freedom of intimate association, not all clubs will be protected, and thus the law is valid in some situations.[59]

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48. *Id.* at 547.
49. *Id.* at 548.
50. *Id.*
51. *Id.* at 549.
52. 487 U.S. 1 (1988).
53. *Id.* at 13.
54. *Id.* at 5.
55. *Id.* at 7.
56. *Id.* at 8.
57. *Id.* at 12.
58. *Id.*
59. *Id.*

The Court also dismissed an expressive association argument.[60] Again, the Court noted that some clubs may have been afforded such protection, but many would not, and thus the law was not invalid on its face.[61] The Court considered that the New York law did not prevent associations from forming to advocate public or private views,[62] nor did it force clubs to halt or alter activities protected by the First Amendment.[63] The law also did not prevent a club from excluding an individual who did not share the views that the club promoted.[64] Instead, race, sex, and other specified characteristics cannot be used as "shorthand measures" instead of more legitimate criteria for determining membership.[65]

In *Dale* the Supreme Court again examined whether a public accommodations law infringed upon a group's freedom of expressive association.[66] The Court in *Dale* broke from the trend set in the above cases. For the first time, the Court ruled that a public accommodations law was unconstitutional because it infringed on a group's right of expressive association without serving a compelling interest.[67]

III. LEGAL REASONING

In a five-to-four majority opinion, the United States Supreme Court in *Dale* applied a three-prong test before holding that the Boy Scouts' First Amendment right of expressive association was violated by the application of New Jersey's Law Against Discrimination ("LAD") to prohibit the Boy Scouts from excluding gays.[68] Chief Justice Rehnquist delivered the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas.[69]

After discussing the procedural history of the case, the Court reviewed the beneficial policy concerns connected with the freedom of expressive association.[70] The Court noted that the right to expressive association preserves political and cultural diversity and prevents the majority from suppressing dissident expression.[71] Furthermore, the Court added that

60. *Id.* at 13.
61. *Id.* at 14.
62. *Id.* at 13.
63. *Id.* (citing *Rotary*, 481 U.S. at 548).
64. *Id.*
65. *Id.*
66. *Dale*, 120 S. Ct. at 2449.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 2451.
71. *Id.* (citing *Roberts*, 468 U.S. at 622).

"[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."[72] However, the Court recognized that the freedom of expressive association "could 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.'"[73]

The Court applied a three-prong test to determine whether the Boy Scouts is protected by the First Amendment's right of expressive association.[74] In the first prong, the Court looked at whether the Boy Scouts engages in expressive association.[75] To be protected by the First Amendment's freedom of expressive association, "a group must engage in some form of expression, whether it be public or private."[76] The Court looked to the words of the Boy Scouts' mission statement, its Scout Oath, and the Scout Law.[77] Because the Boy Scouts seeks to "instill values in young people"[78] by having adult leaders act as leaders and role models, the Court found it "indisputable" that the Boy Scouts, which "seeks to transmit such a system of values[,] engages in expressive activity."[79]

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72. *Id.* (citing *New York State Club*, 487 U.S. at 13).
73. *Id.* (quoting *Roberts*, 468 U.S. at 623).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 2451-52. The mission statement reads 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. The values we strive to instill are based on those found in the Scout Oath and Law.

Id. at 2451. The Scout Oath reads as follows: "On my honor I will do my best [t]o do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." *Id.* at 2451-52. The Scout Law reads as follows:

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverant.

Id. at 2452.
78. *Id.* at 2452 (quoting the Boy Scouts' mission statement).
79. *Id.*

After finding that prong one was satisfied, the Court turned to prong two: "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[80] To answer this question, the Court first tried to discern the Boy Scouts' actual view towards homosexuality.[81] Though the Scout Oath does not mention sexuality directly, it does include the terms "morally straight" and "clean."[82] The Court took into account statements made by the Boy Scouts that: (1) it "teach[es] that homosexual conduct is not morally straight;"[83] and (2) it does "not want to promote homosexual conduct as a legitimate form of behavior."[84] Also, the Court cited position statements made by the Boy Scouts in 1978, 1991, and 1993 that state homosexuals are not allowed membership.[85] In addition, in *Curran v. Mount Diablo Council of Boy Scouts of America*,[86] filed in the early 1980s, the Boy Scouts purported the same position towards homosexuality as it conveyed in *Dale*.[87] Because of the consistency of the above evidence, the Court concluded the Boy Scouts' alleged view towards homosexuality was sincere.[88]

After discerning the Boy Scouts' attitude towards sexuality, the Court "[gave] deference to [the Boy Scouts'] view of what would impair its expression."[89] Dale holds himself out to the community as being gay, and thus his presence would send a message that the Boy Scouts "accept[] homosexual conduct as a legitimate form of behavior."[90] Forcing the Boy Scouts to admit Dale would, in effect, compel the Boy Scouts to "propound a point of view contrary to its beliefs."[91]

The Court in *Dale* supported its proposition by citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[92] In *Hurley* the Court held that Massachusetts violated the First Amendment by requiring private citizens who organized a parade to include among the participants a group imparting a message the organizers did not wish to

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 2453 (quoting Petitioners' Brief at 39).
84. *Id.* (quoting Petitioners' Reply Brief at 5).
85. *Id.*
86. 952 P.2d 218 (Cal. 1998).
87. 120 S. Ct. at 2453 (citing *Curran*, 952 P.2d at 218).
88. *Id.*
89. *Id.*
90. *Id.* at 2454.
91. *Id.*
92. 515 U.S. 557 (1995).

convey.[93] The Court in *Dale*, quoting *Hurley,* stated that "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control."[94]

Moreover, the Court remarked: "[An] association[] do[es] not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."[95] Certainly, the First Amendment "does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"[96] For these reasons, the Court answered prong two by holding that the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate its desired views.[97]

Finally, the Court addressed prong three: "whether the application of New Jersey's [LAD] to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Boy Scout's freedom of expressive association."[98] The Court began its prong three analysis by noting that public accommodations laws have expanded in scope from covering physical places to covering places where the public may be invited, such as summer camps.[99] The Court recognized that New Jersey broadened the public accommodations definition by applying its public accommodations law to the Boy Scouts, a private entity, "without even attempting to tie the term 'place' to a physical location."[100] Next, the Court applied a traditional First Amendment analysis.[101] Although the parade in *Hurley* was not deemed an expressive association, the Court noted that the First Amendment analysis in *Hurley* is similar to the analysis applied in *Dale*.[102] Answering prong three, the Court held New Jersey's requirement that Dale be admitted significantly burdened the Boy Scouts' "right to oppose or disfavor homosexual conduct."[103] New Jersey's interest was not enough to justify "such a severe intrusion

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93. *Id.* at 559.

94. 120 S. Ct. at 2454 (quoting *Hurley*, 515 U.S. at 575). The Court did not rely on *Hurley*, a freedom of speech case, to reach its holding in *Dale*, a freedom of association case. However, the Court used aspects of the decision in *Hurley* to support its reasoning in *Dale*. For a summary of *Hurley*, see Frey, *supra* note 33, at 587-89 (also distinguishing between the *Hurley* case and the "Roberts trilogy").

95. 120 S. Ct. at 2454.

96. *Id.* at 2455.

97. *Id.* at 2454.

98. *Id.* at 2455.

99. *Id.* at 2455-56.

100. *Id.* at 2456.

101. *Id.* at 2457.

102. *Id.*

103. *Id.*

on the Boy Scouts' rights to freedom of expressive association."[104] Therefore, New Jersey's LAD forcing the Boy Scouts to accept Dale as an assistant scoutmaster violated the Boy Scouts' First Amendment right.[105]

In dissent Justice Stevens, along with Justices Souter, Ginsburg, and Breyer, stated that New Jersey's LAD neither burdens the Boy Scouts' "'collective effort on behalf of [its] shared goals,'"[106] nor forces the Boy Scouts to express any message that it does not want to promote.[107] Justice Stevens emphasized that sexual matters are never expressly mentioned in either the Boy Scouts' Law or Oath,[108] and that Scoutmasters are not to instruct Scouts about sex.[109]

Justice Stevens was not persuaded by the prior position statements made by the Boy Scouts that the organization actively expressed a view against homosexual conduct. In his discussion, Justice Stevens cited a 1978 letter signed by the Boy Scouts' President.[110] Admittedly, the letter did adopt an exclusionary membership policy; however, "simply adopting a policy has never been considered sufficient, by itself, to prevail on a right to associate claim."[111] Moreover, the 1978 policy was never publicly expressed.[112] The letter also stated that, if an antidis-

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104. *Id.*

105. *Id.*

106. *Id.* at 2459-60 (Stevens, J., dissenting) (quoting *Roberts*, 468 U.S. at 622).

107. *Id.* at 2460.

108. *Id.* at 2461.

109. *Id.* at 2462. Justice Stevens quoted the Scoutmaster Handbook (1972), which reads: "You may have boys asking you for information or advice about sexual matters . . . . How should you handle such matters? Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life." *Id.* at 2462.

110. The portion of the letter quoted by Justice Stevens is as follows:

> 4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?
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> A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.
>
> 5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?
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> 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, in this case as in Paragraph 4 above. It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate.

Id. at 2463 (emphasis omitted).

111. *Id.* at 2464.

112. *Id.* at 2463.

crimination law conflicted with the Boy Scouts' policy, then a Scout must adhere to the laws, regardless of that Scout's own beliefs.[113] Although the letter states that homosexuality is inappropriate, the letter does not connect that statement to a shared goal or expressive activity of the Boy Scouts.[114] The subsequent policy statements relied on by the majority were issued after the Boy Scouts revoked Dale's membership, and thus are not relevant.[115] In addition, the Boy Scouts never took a "clear and unequivocal view," which is needed to prevail over an antidiscrimination law.[116] For these reasons, the Boy Scouts failed to prove either a clear position or expressive activity connected to its policy.[117]

Placing *Dale* in context of past decisions, Justice Stevens noted:

> until today, [the Court has] never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.[118]

Justice Stevens then listed principles made clear by the Court in *Jaycees* and *Rotary Club*.[119] Simply engaging in expressive activity adopting an exclusionary membership policy is not enough for a claim of expressive association to trump a State's antidiscrimination law.[120] Moreover, the connection between a group's exclusionary policy and a group's expressive activity must be more than merely stated.[121]

For the above reasons, Justice Stevens examined what, exactly, the Boy Scouts' shared goals were and to what extent the inclusion of homosexuals would affect the Boy Scouts' expressive activities.[122] Rather than deferring to the Boy Scouts' assertions in their briefs, Justice Stevens believed that the evidence, which included the Boy Scouts' mission statement, Oath, and its hands-off approach towards dealing with sexuality, demonstrated that the Boy Scouts "has no shared goal of disapproving of homosexuality."[123] In addition, Stevens did not

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113. *Id.* at 2463-64.
114. *Id.* at 2464.
115. *Id.*
116. *Id.* at 2465.
117. *Id.* at 2466.
118. *Id.* at 2467.
119. *Id.* at 2468.
120. *Id.* at 2468-69.
121. *Id.*
122. *Id.* at 2469-70.
123. *Id.* at 2470.

believe that admitting Dale as a member would express any message.[124]

Justice Stevens distinguished *Hurley* from *Dale*.[125] Unlike the group to be included in *Hurley*, Dale's inclusion in the Boy Scouts would neither express a message nor constitute an act of First Amendment symbolic speech.[126] Justice Stevens stated that "a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission of some person as a member."[127] Therefore, Justice Stevens asserted that the application of New Jersey's LAD forcing the Boy Scouts to include Dale did not violate the Boy Scouts' right to expressive association.[128]

Justice Souter, along with Justices Ginsburg and Breyer, joined Justice Stevens' dissent, but included additional comments.[129] Justice Souter concluded that the Boy Scouts has "not made out an expressive association claim, . . . not because of what [the Boy Scouts] may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message."[130] Justice Souter noted that, to allow a party to claim a right of expressive association on a position that it does not unequivocally advocate, and "to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law."[131]

IV. IMPLICATIONS

An interesting aspect of *Dale* is that the New Jersey Supreme Court became the first State Supreme Court to hold that the Boy Scouts is a place of public accommodation, and thus subject to a public accommodations law.[132] No federal appellate court has reached such a holding. In fact, four other state supreme courts have reached the opposite

124. *Id.* at 2476.
125. *Id.* at 2475.
126. *Id.*
127. *Id.* at 2476.
128. *Id.* at 1476-77.
129. *Id.* at 2478 (Souter, J., dissenting).
130. *Id.* at 2479.
131. *Id.*
132. 120 S. Ct. at 2456 n.3.

conclusion.[133] The United States Supreme Court did not state a holding on this particular issue. However, the Court did mention how "extremely broad"[134] the definition of a public accommodation had been stretched by New Jersey. The Court also noted that, in applying its public accommodations law to a private entity such as the Boy Scouts, the State did not even attempt "to tie the term 'place' to a physical location."[135] As a result of this expanding definition, *Dale* illustrates that the number of conflicts between public accommodations statutes and groups' First Amendment rights of association will only increase in the future.[136]

Most significantly, *Dale* is the first case in which a right to associate prevailed over a state's antidiscrimination law.[137] Until *Dale*, the Court has "squarely held [to the contrary] that a state's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy."[138]

Dale does not overturn prior cases such as *Roberts, Duarte*, and *New York State Club*. The analysis of an expressive association claim, as of now, will remain the same as that explained in *Roberts*. However, *Dale* may open the window of opportunity for organizations to legally and blatantly discriminate against homosexuals. If nothing else, the majority opinion in *Dale* may provide a blueprint for groups who wish to discriminate and exclude homosexuals.

Of high interest is the majority's deference to the Boy Scouts' view of what would impair its expression.[139] Both dissents suggest that the evidence failed to prove the Boy Scouts clearly and unequivocally advocate against homosexuality.[140] Justice Stevens noted that by deferring to positions stated in a party's brief, the boundaries of legitimate right to associate claims would be lost, civil rights legislation could become a "nullity," and the "important constitutional right" of

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133. *Id.* The cases mentioned are the following: *Curran*, 952 P.2d 218 (Cal. 1998); Seaburn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995); Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987); Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976). In addition, the United States Court of Appeals held that the Boy Scouts is not a place of public accommodation (*Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993).

134. 120 S. Ct. at 2455.

135. *Id.* at 2456.

136. *Id.*

137. *Id.* at 2467.

138. *Id.*

139. *Id.* at 2453.

140. *Id.* at 2471-72, 2479.

expressive association could become a "farce."[141] With that in mind, the majority's holding could "convert the right of expressive association into an easy trump of any antidiscrimination law."[142]

Also, the majority held that the State's interest in curbing the harmful effects of discrimination does not justify an intrusion on the Boy Scouts' "right to oppose or disfavor homosexual conduct."[143] In his dissent, Justice Stevens noted that, unless a different type of scrutiny is applied, the right to expressive association will allow groups to discriminate whenever a group can contrive an expressive object inconsistent with the admission of an unwanted person.[144]

Issues addressing homosexuality flood the media daily, and they are pouring into the courtroom. The Court in *Dale* resolved this case by a five-to-four majority, with Justice Steven's dissent stretching nearly twice as long as Justice Rehnquist's opinion. However, it remains to be seen whether the right to freedom of expressive association will truly become "an easy trump of any antidiscrimination law."[145] Past cases would indicate no, but *Dale* may have opened that door.

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141. *Id.* at 2471.
142. *Id.* at 2479.
143. *Id.* at 2457.
144. *Id.* at 2476.
145. *Id.* at 2479.

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