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Coming Out Is a Free Pass Out: Boy Scouts of America v. Dale

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COMING OUT IS A FREE PASS OUT: *BOY SCOUTS OF AMERICA V. DALE*¹

*Indeed, the overarching goal . . . is nothing less than the eradication “of the cancer of discrimination.”*²

*On the other hand, “[a] society in which each and every organization must be equally diverse is a society which has destroyed diversity.”*³

I. INTRODUCTION

In *Boy Scouts of America v. Dale*,⁴ the Supreme Court of the United States “convert[ed] the right of expressive association into an easy trump of any anti-discrimination law.”⁵ For years, states have been attempting to prevent discrimination by enacting public accommodation laws that give individuals equal access to public goods and services.⁶ Recently, many state legislatures have amended their public accommodation laws, adding homosexuals to the list of protected individuals.⁷

¹ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

² *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793 (N.J. 1969)) (describing the purpose of New Jersey’s public accommodation statute).

³ Petitioners’ Brief at *19-*20, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699).

⁴ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

⁵ *Id.* at 2479 (Souter, J., dissenting). Others argue that if the government is not restricted, freedom of expression will become a fiction. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1147 (1983).

⁶ Marissa L. Goodman, Note, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 828-33 (1999); See also Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27, 39-55 (1994) (discussing the effects of using different statutory constructions for public accommodation laws when applied to “quasi-private clubs,” including definitions based upon business aspects, public use and physical place).

⁷ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 356-61 (1999) (listing examples of state and municipal laws against sexual orientation discrimination between 1972 and 1998). See also Jose Gomez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 LAW & INEQ. J. 121, 121-23 (1983) (citing examples of various rights denied to individuals based upon sexual orientation).

This Note discusses the three Supreme Court cases that have delineated the battle between public accommodation laws and an organization's freedom of expressive association: *Roberts v. United States Jaycees*,⁸ *Board of Directors of Rotary International v. Rotary Club of Duarte*,⁹ and *New York State Club Association, Inc. v. City of New York*.¹⁰ Specifically, this Note focuses on the development of the balancing test which courts use to protect these two constitutional freedoms.¹¹ This Note then analyzes the Supreme Court's decision in *Boy Scouts of America v. Dale*, pointing out its deviations from the *Roberts* Trilogy.¹² Finally, this Note explains the consequences of the Supreme Court's reasoning, specifically concentrating on the determination of an association's expression; the blurring of the freedom of association and the freedom of speech; and the silencing of self-identifying speech.¹³

II. BACKGROUND

Although not an enumerated right, the Supreme Court has recognized a right to the freedom of association. This right was first expressed by the Court in *NAACP v. Alabama ex rel. Patterson*,¹⁴ describing it as a "freedom to engage in associations for the advocacy of beliefs

⁸ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁹ *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

¹⁰ *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988).

¹¹ *See infra* Part II.

¹² *See infra* Part III.C. The *Roberts* Trilogy refers to the three Supreme Court cases involving the issue of public accommodation laws conflicting with an organization's freedom of association: *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). *See* Karen L. Dayton, Note, *Dale v. Boy Scouts of America: New Jersey's Law Against Discrimination Weighs the Balance Between the First Amendment and the State's Compelling Interest in Eradicating Discrimination*, 16 GA. ST. U. L. REV. 387, 414 (1999).

¹³ *See infra* Part IV.

¹⁴ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

and ideas.”¹⁵ The Court later divided this right into two distinct parts: the freedom of intimate association and the freedom of expressive association.¹⁶

The freedom of expressive association is rooted in the freedom to collectively espouse beliefs and ideas.¹⁷ Inherent in this right is the concept that a *group* of people, within an association, may more effectively advocate an idea.¹⁸ People also join associations to create a sense of community by associating with people who share common interests, backgrounds, viewpoints, and philosophies; a freedom indispensable to liberty.¹⁹ Yet, inherent in the right to associate is a right to disassociate.²⁰ An organization’s freedom of expressive association may be infringed upon by either impairing the group’s ability to engage in protected activities or by

¹⁵ *Id.* at 460. The Supreme Court has construed the freedom of association differently so that in some cases the Court has actually found no fundamental right to associate. Shawn M. Larsen, Note, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359, 366 n.50 (1999).

¹⁶ *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The Court defined intimate association as including the freedom to enter into and maintain certain intimate human relationships, including “marriage . . . childbirth . . . raising and educating children . . . and cohabitation with one’s relatives.” *Id.* at 619 (citations omitted). To determine if an organization has a right of intimate association, the Court looks to the size, purpose, policies, and selectivity of the group. *Id.* at 620. The Court defined expressive association as a freedom to associate for the purpose of “engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Id.* at 618. The freedom at stake and an objective assessment of the relationship’s attachment dictate the amount of constitutional protection. *Id.*

¹⁷ *See supra* notes 14-15 and accompanying text. One of the underlying purposes of the freedom of expressive association is to preserve diversity by protecting the expression of minority viewpoints. *Roberts*, 468 U.S. at 623.

¹⁸ *See Patterson*, 357 U.S. at 460 (emphasis added).

¹⁹ Frank, *supra* note 6, at 31-34 (discussing the various reasons why people join organizations, including community, political, religious, or business reasons). There is often a desire to associate with similar individuals, thereby excluding individuals who are different. *Id.* at 34.

²⁰ *See Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 234-35 (1977). In *Abood*, the Supreme Court found that requiring a person to make a political contribution, as opposed to prohibiting a person from making a contribution, is a violation of the First Amendment. *Id.* at 234.

imposing restrictions on the group's ability to exclude individuals with different ideologies or philosophies.²¹

In contrast, public accommodation laws have been enacted to prevent discrimination in places of public accommodation.²² These laws encompass a multitude of diverse organizations.²³ The interest of an individual to choose those with whom he associates, implicitly choosing those from who to disassociate, and the state's interest in eradicating discrimination may often directly conflict.²⁴ Battle lines are drawn when a public accommodation law is used to open the membership of an organization because it asserts a

²¹ Andrew J. Breuner, Comment, *Expression by Association: Towards Defining an Expressive Association Defense in Unruh-Based Sexual Orientation Discrimination Actions*, 33 SANTA CLARA L. REV. 467, 473 (1993) (discussing the Supreme Court's finding of potential infringements in *Roberts*, *Rotary International*, and *New York State Club Association*).

²² The Supreme Court has held that it is within the state's power to enact public accommodation laws when the legislature believes a group is the target of invidious discrimination. *Romer v. Evans*, 517 U.S. 620, 627-29 (1996) (discussing the common evolution of public accommodation laws). One highly-supported scholar attributes the conflict to a greater tension between "egalitarian, rights-oriented liberalism" and "communitarianism." Douglas O. Linder, Comment, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1881 (1984). The former seeks a system providing equal opportunity to pursue beliefs and goals to form identity. *Id.* The latter seeks a system preventing state interference in order to preserve communities, which form identity. *Id.*

²³ See Erika M. Brown & Stephanie Greene, *From Private Clubs to Parades: How Accommodating Are State Laws?* 42 N.Y.L. SCH. L. REV. 125, 130-40 (1998) (citing examples of organizations found by the courts to be subject to public accommodation laws including a country club, gun club, university eating club, and The Boy's Club; however, a debate and literary club, French family club, a city parade, and The Elk's Lodge were not subject to public accommodation laws). See also William F. Grady, Comment, *The Boy Scouts of America as a "Place of Public Accommodation": Developments in State Law*, 83 MARQ. L. REV. 517, 524-42 (1999) (outlining various public accommodation laws as applied to the Boy Scouts of America).

²⁴ Goodman, *supra* note 6, at 834-35. The Court framed its reasoning on the assumption that the freedom of association applies to the group's right to exclude individuals, which is termed a negative right of association. Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. CIV. RTS. L.J. 111, 113 (1997). However, if the Court would recognize a positive right to associate, which is based upon an individual's right to associate with others providing society's goods and services, the negative right to associate would be superseded. *Id.* at 114-18.

constitutional right to discriminate.²⁵ In order to define each of their limits, it is necessary to visit the line of cases dealing with these conflicting interests.

A. *Roberts v. United States Jaycees*²⁶

In 1984, the United States Jaycees²⁷ challenged the application of the Minnesota Human Rights Act,²⁸ which required the Jaycees to admit women. The Supreme Court, while acknowledging that the Jaycees had the right to associate for expressive purposes, characterized this right as not absolute.²⁹ The Court stated that “infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”³⁰ The Court recognized two compelling state interests: ensuring equal access to goods and services³¹

²⁵ See Frank, *supra* note 6, at 57. Organizations assert a constitutional right to discriminate by relying on Justice Douglas’ dissent in *Moose Lodge No. 107 v. Irvis*. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting). Justice Douglas stated that the Constitution permits “all white, all black, all brown, and all yellow clubs to be formed.” *Id.* at 180. However, he later points out that when the public domain is implicated, one may not exercise this right. *Id.* At odds with the majority, Justice Douglas argued that, by definition, a private club could never be within the public domain. *Id.* Others argue that society must accept the costs, including discrimination, to preserve diversity because forced acceptance in order to uphold society’s principles will slowly erode an organization’s distinctive character. William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 875 (1999).

²⁶ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

²⁷ As set out in its bylaws, the Jaycees’ objective is to develop a young men’s civic organization designed to promote patriotism, personal development, and friendship. *Id.* at 612.

²⁸ MINN. STAT. § 363.03 (1982). The Act prohibited discrimination based on gender in places of public accommodation. *Id.* A place of public accommodation is a business providing public goods and services for the purpose of the political, social, and economic advancement of the public. MINN. STAT. § 363.01 (1982).

²⁹ *Roberts*, 468 U.S. at 623. Since the freedom of expression is not absolute, courts justify restrictions of expression when there is a probability that the expression will give rise to an apprehended harm, the harm is grave, and restriction of expression is necessary to decrease the likelihood of the harm. Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 6 (1951).

³⁰ *Roberts*, 468 U.S. at 623. The Court found that the Jaycees did not have a right of intimate association because the group was too large and unselective. *Id.* at 620-21.

³¹ *Id.* at 624.

and eliminating a stigmatizing injury based upon stereotypes.³² The Court reasoned that admitting women into the Jaycees would not impede the Jaycees' "ability to engage in these protected activities or to disseminate its preferred views,"³³ therefore, applying Minnesota's public accommodation law would not violate the Jaycees' freedom of expressive association.³⁴

*B. Board of Directors of Rotary International v. Rotary Club of Duarte*³⁵

In 1987, the Supreme Court, following the reasoning of *Roberts*,³⁶ held that the application of the Unruh Act³⁷ to local Rotary Clubs,³⁸ which required the admission of women, would not significantly affect the existing members' ability to carry out their various expressive purposes.³⁹ The Court reasoned that the Unruh Act would not require the club to "abandon or alter" any of their activities.⁴⁰ Furthermore, the Court felt that even if the Unruh Act did infringe

³² *Id.* at 625.

³³ *Id.* at 627. "[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities." *Id.* at 625. "[W]e decline to indulge in the sexual stereotyping that underlies [the Jaycees'] contention, that by allowing women to vote, . . . [it] will change the content or impact of the organization's speech." *Roberts*, 468 U.S. at 623.

³⁴ *Id.* at 627. The Court found the admission of women would not require the Jaycees to change its creed, or prohibit its ability to exclude those with different philosophies. *Id.*

³⁵ *See* Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

³⁶ *Id.* at 544-45.

³⁷ CAL. CIVIL CODE § 51 (West 1982) (providing for equal access to all business establishments).

³⁸ As stated in its procedure manual, Rotary International is a service organization of business and professional men advocating ethical standards in all vocations. *Rotary Int'l*, 481 U.S. at 539. The Court denied protection of intimate association because of the club's size and membership selectivity. *Id.* at 546.

³⁹ *Id.* at 548. "Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require . . . them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace." *Id.*

⁴⁰ *Id.* The Court believed that, with an open membership, the club would get a more accurate representation of the community, therefore achieving its goals of service and promoting ethical business standards. *Id.* at 549-50.

on the club's right of expressive association, the infringement was justified because the Act served a compelling state interest.⁴¹

C. *New York State Club Association, Inc. v. City of New York*⁴²

The *New York State Club Association*⁴³ sought a declaration that *New York City's Human Rights Law*⁴⁴ was facially unconstitutional because it infringed on the organization's freedom of association. Once again, the Supreme Court held that the public accommodation law would not require clubs to "abandon or alter" any of their activities.⁴⁵ The Court, thinking ahead, noted that an organization could potentially show a violation of its freedom of expressive association if it were organized specifically for that expressive purpose.⁴⁶ These three cases have given organizations the opportunity to discriminate, so long as the discriminatory acts are manifested in their expressive purpose.

⁴¹ *Id.* at 549. In this case, the compelling state interest was eliminating discrimination against women. *Id.*

⁴² *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). The *New York State Club Association* is a non-profit association consisting of 125 private clubs within the state of New York.

⁴³ *Id.* at 8.

⁴⁴ N.Y.C. ADMIN. CODE § 8-107(2) (1986) (prohibiting discrimination in a place of public accommodation because of sex, race, creed, color, or national origin). A place of public accommodation includes restaurants, public halls, and theatres, but excludes any place of accommodation that is distinctly private in nature. N.Y.C. ADMIN. CODE § 8-102(9) (1986). In 1984, the Human Rights Law was amended, stating that any place of accommodation with more than 400 members is not considered distinctly private in nature. *New York State Club Ass'n*, 487 U.S. at 8.

⁴⁵ *Id.* at 13. "Instead, the [l]aw merely prevents an association from using race, sex, and other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Id.*

⁴⁶ *Id.*

III. STATEMENT OF THE CASE

A. *Statement of Facts*

In 1989, after actively participating in the association for 11 years,⁴⁷ the Boy Scouts of America (BSA) approved Dale's application for adult membership in the Boy Scouts as an assistant scoutmaster.⁴⁸ Dale then enrolled at Rutgers University, where he acknowledged to himself – and others – that he was gay, and he eventually became co-president of the Rutgers University Lesbian/Gay Alliance.⁴⁹ In 1990, a newspaper, covering a seminar on homosexual issues, published an interview with Dale about his advocacy of gay and lesbian teenagers' need for gay role models.⁵⁰ This article was forwarded to BSA, which revoked Dale's adult

⁴⁷ *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000). Dale first became a member of the BSA in 1978, when he joined the Monmouth Council's Cub Scout Pack. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204 (N.J. 1999). Dale became a Boy Scout in 1981 and attained the rank of Eagle Scout in 1988. *Id.* Dale remained a Scout until he turned 18. *Id.* During his years as a youth member, Dale was "exemplary," earning 25 merit badges and participating in honorary societies. *Id.*

⁴⁸ *Dale*, 120 S. Ct. at 2449 (2000). The sponsoring institution, the local Council, and the national Boy Scouts of America organization must approve an adult leader. Petitioners' Brief at *4, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699). The applicant must adhere to the Scout Oath and Law, the Declaration of Religious Principle, and satisfy multiple informal criteria, which evaluate the applicant's moral qualities necessary for leadership. *Id.* However, how the BSA determines and evaluates the criteria is not explained. Goodman, *supra* note 6, at 876 (discussing the differences between membership and leadership requirements in the Boy Scouts of America as shown in the respective application forms).

⁴⁹ *Dale*, 120 S. Ct. at 2449.

⁵⁰ See Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, at 2-11 (covering a seminar addressing the psychological and health needs of lesbian and gay teenagers).

membership shortly thereafter.⁵¹ The BSA dismissed Dale because the Boy Scouts “specifically forbid[s] membership to homosexuals.”⁵²

B. Procedural History

In 1992, Dale filed a complaint in the New Jersey Superior Court against the BSA and the Monmouth Council, alleging that the Boy Scouts violated New Jersey’s public accommodation statute⁵³ by revoking Dale’s membership based solely upon his sexual

⁵¹ *Dale*, 120 S. Ct. at 2449. The letter, from Monmouth Council Executive James W. Kay, instructed Dale to “sever any relations” with the BSA. *Dale*, 734 A.2d at 1205. Dale requested a review of his termination, which the Northeast Region Review Committee ultimately affirmed. *Id.* On four separate occasions during the review process, Dale made specific written requests to various Council members and directors requesting a copy of the leadership standards and notice of the review date. *Id.* The BSA never complied or acknowledged Dale’s requests. *Id.*

⁵² *Dale*, 120 S. Ct. at 2449. This policy was stated in Monmouth Council’s reply to Dale’s inquiry into his adult membership revocation. *Id.*

⁵³ N.J. STAT. ANN. § 10:5-4 & 5-5 (West Supp. 2000). Section 10:5-4 states:

Obtaining employment, accommodations and privileges without discrimination; civil right: All persons shall have the opportunity to obtain employment, and to obtain all 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 and declared a civil right.

N.J. STAT. ANN. § 10:5-4 (West Supp. 2000). New Jersey defines a place of public accommodation in § 10:5-5 as:

As used in this act, unless a different meaning clearly appears from the context: 1. A place of public accommodation shall include, but not be limited to: any 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 seashore 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. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or

orientation.⁵⁴ The Superior Court's Chancery Division granted summary judgment in favor of BSA, holding that New Jersey's public accommodation statute was inapplicable because BSA was not a place of public accommodation.⁵⁵ Alternatively, the Court held that BSA is a distinctly private group exempted from the statute.⁵⁶ Finally, the Court held that the Boy Scouts' First Amendment freedom of expressive association prevented the government from compelling BSA to retain Dale as an assistant scoutmaster.⁵⁷

The New Jersey Superior Court's Appellate Division reversed and remanded, holding that BSA was a place of public accommodation under New Jersey's statute,⁵⁸ and not a "distinctly private" organization.⁵⁹ Furthermore, the Appellate Division held that applying New

place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students.

N.J. STAT. ANN. § 10:5-5 (West Supp. 2000). In 1991, the New Jersey Legislature amended the Law Against Discrimination to include protections based on "affectional or sexual orientation." In New Jersey, the goal of public accommodation law is the "eradication of the cancer of discrimination." *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793, 799 (N.J. 1969)).

⁵⁴ The complaint also alleged a violation of New Jersey common law on the same grounds; however, the New Jersey Supreme Court affirmed the Superior Court and Appellate Division's rejection of the common law claim, holding it was a duplication of the Law Against Discrimination claim. *Dale*, 734 A.2d at 1219.

⁵⁵ *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 283. However, one United States Court of Appeals and four state supreme courts have ruled that the BSA is not a place of public accommodation. *See, e.g.,* *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276 (7th Cir. 1993); *Curran v. Mount Diablo Council of Boy Scouts of Am.*, 952 P.2d 218, 235 (Cal. 1998); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 406 (Kan. 1995); *Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352, 359 (Conn. 1987); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976).

⁵⁹ *Dale*, 706 A.2d at 283.

Jersey's public accommodation law did not violate the BSA's right to freedom of intimate⁶⁰ or expressive⁶¹ association under the First Amendment.

The Supreme Court of New Jersey granted certiorari⁶² and, adopting the same reasoning, affirmed the Appellate Division's decision on all three issues.⁶³

C. U.S. Supreme Court Decision

The Supreme Court, in a five-to-four decision,⁶⁴ reversed the Supreme Court of New Jersey.⁶⁵ The only issue was whether the application of New Jersey's public accommodation law violated the First Amendment's expressive, associational right of the Boy Scouts of America.⁶⁶ In the majority opinion, Chief Justice Rehnquist began by determining whether BSA engages in "expressive association."⁶⁷ The Court reasoned that an association seeking to transmit a system of values engages in expressive activity protected by the First Amendment.⁶⁸ Next, the Court determined whether the forced inclusion of Dale would significantly affect the Boy Scouts'

⁶⁰ *Id.* at 286 (reasoning that the BSA lacks the qualities of an intimate association because of the association's size, advertising and recruiting practices).

⁶¹ *Id.* at 288 (reasoning that the BSA's ability to express their views or carry out their activities will not be affected in any significant way).

⁶² *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200 (N.J. 1999).

⁶³ *Id.* at 1230.

⁶⁴ Justice Rehnquist delivered the majority opinion in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *See Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2449-58 (2000). Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. *Id.* at 2458-78. (Stevens, J., dissenting). Justice Souter also filed a dissenting opinion in which Justices Ginsburg and Breyer joined. *Id.* at 2478. (Souter, J., dissenting).

⁶⁵ *Id.* at 2458.

⁶⁶ *Id.* at 2451.

⁶⁷ *Id.*

⁶⁸ *Dale*, 120 S. Ct. at 2452. The Court relied on Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees* which stated that "even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring)).

ability to advocate public or private viewpoints.⁶⁹ To resolve this question, the Court explored the nature of the Boy Scouts' view of homosexuality⁷⁰ and the possible impairment of that view.⁷¹ Finally, the Court questioned whether the application of New Jersey's public accommodation law would violate BSA's freedom of expressive association.⁷² Answering affirmatively to all three questions, the Court swiftly struck down Dale's claim.⁷³

IV. ANALYSIS

In *Boy Scouts of America v. Dale*,⁷⁴ the Supreme Court began its decision by applying the balancing test as developed in the *Roberts* Trilogy.⁷⁵ However, the Court failed to make a satisfactory review of the BSA's expressive claim and quickly shifted the BSA's freedom of expressive association claim into a freedom of speech claim, a highly protected constitutional right that easily outweighs any state interest.⁷⁶

⁶⁹ *Id.* at 2446.

⁷⁰ *Id.* at 2451-54. The BSA's view of homosexuality was determined from the Scout Oath and Law, a 1978 position statement from the President of the BSA to the BSA's Executive Committee, and a 1991 position statement, which was prepared after Dale was expelled, but before this case began. *Id.*

⁷¹ *Id.* at 2453-55. Dale's presence would force the BSA to send a message to the world and its own members that the BSA accepts homosexual orientation as an acceptable form of behavior. *Id.* at 2453.

⁷² *Id.* at 2455.

⁷³ *Id.* at 2451-56.

⁷⁴ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

⁷⁵ See *supra* note 12 discussing the cases in the *Roberts* Trilogy. See also *supra* notes 26-46 and accompanying text for a discussion of the *Roberts* balancing test.

⁷⁶ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

A. *Before* Boy Scouts of America⁷⁷

In *Roberts*, the Supreme Court laid down the basic framework for deciding conflicts between a state's interest and an organization's freedom of expressive association.⁷⁸ The Court developed a balancing test: weigh the state's compelling interest⁷⁹ against the organization's freedom of expressive association.⁸⁰ Because a First Amendment right is at stake, the Court applies strict scrutiny to each party's interest.⁸¹ In each case, the Court makes an independent review of the organization's expressive purpose by examining its goals, rules, activities, membership criteria, and selection process.⁸²

Roberts requires courts to determine if the regulation would impair the ability of the organization's members to express the views that brought them together, thereby suggesting a link between the discriminatory practice and the expressive purpose.⁸³ The Court has articulated

⁷⁷ *Id.*

⁷⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 617-29 (1984).

⁷⁹ *Id.* at 624-26. The Court recognized two compelling state interests, unrelated to the suppression of expression: providing equal access to goods and services and preventing stigmatizing injury of perpetuating stereotypes. *Id.*

⁸⁰ *Id.* at 622-29. Some argue the Court did not create a balancing test, but a rebuttable presumption in favor of the state's compelling interest. Larsen, *supra* note 15, at 384.

⁸¹ *See Dale*, 120 S. Ct. at 2451 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567-68 (1995)). The Court is required to make an independent review to ensure there is no forbidden intrusion into the freedom of expression. *Hurley*, 515 U.S. at 567.

⁸² *See, e.g., New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12 (1988) (provides meals, accepts payment from non-members, business transactions made); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539-41 (1987) (each local club adopts its own rules for admission, membership restricted to men, and classification scheme is followed); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984) (acknowledges the political positions on various issues, and partakes in civic, charitable, lobbying, and fundraising activities); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 109 (1981) (charter requires that only Democrats may participate, and be willing to publicly affiliate for the purpose of selecting a Democratic delegate).

⁸³ *Roberts*, 468 U.S. at 623. Two groups that have been suggested to have the ability to link their discrimination and expressive purpose are overtly political organizations and gender or race advancement organizations. Frank, *supra* note 6, at 59-60. Others suggest different options to interpret the link requirement: an indirect effect test,

that the organization must show a serious burden on the member's expressive purpose.⁸⁴ Serious burdens include changing the creed,⁸⁵ abandoning or altering the activities,⁸⁶ hampering effective advocacy of the organization's position,⁸⁷ or preventing the organization's ability to exclude individuals with different ideologies or philosophies.⁸⁸ The Court will uphold an expressive view regardless if it finds the view "unwise or irrational."⁸⁹ However, the Court had consistently refused to give protection based upon stereotypes and pretexts.⁹⁰

characterization of the organization as commercial or expressive, or direct relation between the discrimination and expression. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 78-81 (1986).

Justice O'Connor suggested a commerciality test in her concurring opinion. *Roberts*, 468 U.S. at 632-38 (O'Connor, J., concurring). If an organization is primarily commercial in nature, no freedom of association protection is warranted. *Id.* at 634. However, if an organization is predominantly expressive, constitutional protection is warranted to prevent any affect on the collective voice. *Id.* at 635-36. A commercial distinction would benefit organizations, such as the BSA, which express multiple views on subjects, but remain silent on others. Recent Cases, *Civil Rights – Public Accommodation Statutes – New Jersey Supreme Court Holds that Boy Scouts May Not Deny Membership to Homosexuals*, 113 HARV. L. REV. 621, 324-25 (1999). Such a distinction would provide an organization such as this the ability to protect its freedom of association because members do not join for a primarily commercial purpose. *Id.*

⁸⁴ *Roberts*, 468 U.S. at 626.

⁸⁵ *Id.* at 627.

⁸⁶ *See, e.g., New York State Club Ass'n, Inc.*, 487 U.S. at 13; *Board of Dir. of Rotary Int'l*, 481 U.S. at 548.

⁸⁷ *New York State Club Ass'n*, 487 U.S. at 11.

⁸⁸ *Id.* at 13. *See also, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981).

⁸⁹ *LaFollette*, 450 U.S. at 124. However, these irrational or unwise views must still be constitutional. *Id.* at 1205 n.25. Within its reasoning, the Court has often held that inclusion of the excluded individual would actually further the organization's principles such as having a wide range of members. *See Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). However, some fear that this will enable the judiciary to tell any organization what its creed "really" means. Charles Colson & Nancy Pearcey, *Scouts' Dishonor*, CHRISTIANITY TODAY, Nov. 15, 1999, at 128.

⁹⁰ *E.g., New York State Club Ass'n*, 487 U.S. at 13 (1988) ("Instead, the law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."); *Roberts*, 468 U.S. at 628 ("[W]e decline to indulge in the sexual stereotyping that underlies appellee's contention . . .").

B. *After Boy Scouts of America*⁹¹

In *Boy Scouts of America v. Dale*,⁹² the Supreme Court, although appearing to utilize the balancing test, actually ignored the reasoning developed in the *Roberts* Trilogy.⁹³ The Court noted that it was required to make an independent review in light of the party's First Amendment claims.⁹⁴ However, the Court stated that it must give deference not only to what the BSA claimed as its expressive view, but also to what it claimed would impair this expression.⁹⁵

The BSA claimed that the requirements of the Boy Scouts to be “morally straight” and “clean” prevented admission of homosexuals.⁹⁶ Because written evidence existed that pertained to the BSA's viewpoint on homosexuality, the Court found no need to review the nature of this

⁹¹ *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000).

⁹² *Id.*

⁹³ See *supra* note 12 discussing the cases in the *Roberts* Trilogy. See also *supra* notes 26-46 and accompanying text for a discussion of the *Roberts* balancing test.

⁹⁴ *Dale*, 120 S. Ct. at 2451.

⁹⁵ *Id.* at 2451-54. “As we gave deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.” *Id.* at 2453.

⁹⁶ *Id.* at 2452. The BSA defines morally straight as being:

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 2463. The BSA defines clean as:

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 There is 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.

viewpoint.⁹⁷ The Court reasoned that Dale's mere presence would force the BSA to send a message that homosexuality is moral.⁹⁸ The Court made this conclusion without requiring the BSA to show some connection between the definitions of "morally straight" and "clean," and their anti-homosexual view.⁹⁹ In other words, no link existed between the expressive purpose and the discriminatory conduct, as previously required for constitutional protection.¹⁰⁰

The Court relied on its own reasoning in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.¹⁰¹ However, *Hurley* is a freedom of speech claim, not a freedom of expressive association claim.¹⁰² In that case, the public accommodation law¹⁰³ that required the private parade organizer to include marchers bearing a particular message, violated the

⁹⁷ *Dale*, 120 S. Ct. at 2453. The written evidence the Court relied on were the values of "morally straight" and "clean" in the Scout Oath and Law and a written statement from the president of the BSA to the Executive Committee expressing a policy that open homosexuals could not be BSA leaders. *Id.* at 2151-53. The Court also looked to other similar statements that were continually modified, but were substantially similar, advocating the position that avowed homosexuals were not qualified for membership. *Id.* at 2453-55. The Court referred to these statements as the BSA's "official position." *Id.* at 2455. However, the BSA did not disseminate these various statements to actual members. *Id.* at 2463.

⁹⁸ *Id.* at 2454.

⁹⁹ *Id.* at 2461. In his dissent, Justice Stevens found that BSA merely has an "exclusionary membership policy." *Id.* at 2463 (Stevens, J., dissenting). He based his finding on the fact that the evidence the BSA provided merely showed its effort not to admit avowed homosexuals, but failed to connect the policy to its expressive activities. *Id.* at 2463-64. He used the *Roberts* Trilogy as evidence of the failure of the Supreme Court to protect a group's exclusionary membership policy. *Id.* at 2466-70.

¹⁰⁰ *See, e.g.,* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1,13 (1988); Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548-49 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984); *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122-23 (1981).

¹⁰¹ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

¹⁰² *Id.* at 568-81. The Court noted that if the case had been decided under a freedom of association claim, the parade organizers would still prevail. *Id.* at 580-81. However, one should note this statement is dicta. *See* Darren L. Hutchinson, *Accommodating Outness: Hurley, Free Speech, And Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 104 (1998). However, courts may follow the dicta in later cases. *Id.* In *Dale v. Boy Scouts of America*, the New Jersey Supreme Court declined to follow the reasoning in *Hurley*, distinguishing the facts of the case. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1229 (N.J. 1999). Dale's position as a leader in the Boy Scouts was not equivalent to a group marching in a parade, nor was it equivalent to pure speech. *Id.*

¹⁰³ MASS. GEN. LAWS ch. 272, § 98 (1992). This public accommodation law prohibits discrimination based on sexual orientation in any place of public accommodation. *Id.*

organizer's First Amendment rights.¹⁰⁴ The Court found the parade was a form of expression protected by freedom of speech,¹⁰⁵ and that the presence of GLIB members carrying a banner in the parade would force the speaker to alter the content of his message.¹⁰⁶ Even the presence of "multifarious voices" in the parade did not justify intervention because, as the Court noted, there is no requirement of associating for the purpose of disseminating a particular message in order to be protected.¹⁰⁷ By not requiring a succinct message, the Court alleviated the need for the organization to carry the burden of proof as to its expressive purpose.¹⁰⁸

C. Consequences of Boy Scouts of America¹⁰⁹

1. Determining an Association's Expression

In *Boy Scouts of America*,¹¹⁰ the Supreme Court failed to properly utilize the *Roberts* balancing test because the BSA did not have to prove that its views would be compromised or that Dale would actually promote homosexuality.¹¹¹ Relying on *Hurley*, the Court stated that a

¹⁰⁴ *Hurley*, 515 U.S. at 573.

¹⁰⁵ *Id.* at 568-69.

¹⁰⁶ *Id.* at 573.

¹⁰⁷ *Id.* at 569.

¹⁰⁸ Hutchinson, *supra* note 102, at 102. Hutchinson notes that the Court relied on a distinction between homosexuals carrying a banner in the parade and homosexuals in the parade. *Id.* at 103. This finding was based upon the organizers' claim that they would allow homosexuals to march, just not as a group carrying a banner. *Id.* This distinction only suppresses homosexual identity. *Id.* It permits discrimination if carrying a banner, or in other words, communicating sexual orientation. *Id.* Because sexual orientation is an invisible characteristic, it suppresses all sexual identifying language, but only when the language comes from a homosexual. *Id.*

¹⁰⁹ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

¹¹⁰ *Id.*

¹¹¹ Hutchinson, *supra* note 102, at 91 (suggesting that *Hurley* will play an important role in future decisions and could possibly alter the *Roberts* Trilogy.) *See also infra* note 114.

succinct message was not required for constitutional protection of expressive association.¹¹²

However, the constitutional protection of the association is based upon the notion that a viewpoint is more effectively communicated when it is expressed in one voice.¹¹³

Critics argue that by not requiring a succinct, articulated message, the organization is not required to show why the admission of the excluded individual would burden its specific purpose or that the individual even has a distinct message.¹¹⁴ This lenient approach gives courts broad discretion to decide what facts are relevant in determining an organization's expressive purpose,¹¹⁵ thereby enabling the BSA members and leaders' viewpoints to be mistaken as the organization's expressive purpose.¹¹⁶

¹¹² *Dale*, 120 S. Ct. at 2543. The Court found support from its own decision in *Hurley*, where the parade organizers were able to exclude individuals although the parade's purpose was not to send a particular message. *Id.* See also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995).

¹¹³ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). One could argue that inherent in the concept of expressive association is a requirement that the association collectively espouse one, succinct message.

¹¹⁴ See, e.g., Frank, *supra* note 6, at 62 ("Before a court permits an organization to discriminate, it should continue to require that a discriminatory practice is necessary to the expressive message that an organization wishes to convey If courts require a lesser showing of such a relationship, clubs may make expressive claims that are in fact pretextual."); Cara J. Frey, Comment, *Hate Exposed to the Light of Day: Determining the Boy Scouts of America's Expressive Purpose Solely from Objective Evidence*, 75 WASH. L. REV. 577, 588-89 (2000) ("Unlike *Hurley*, the *Roberts* Trilogy carefully examined the expressive purposes of an organization to determine whether the forced inclusion of a protected class of individuals would substantially burden any *clearly defined* expressive goals of the organization.") (emphasis added); Hutchinson, *supra* note 102, at 102 (arguing that unlike *Hurley*, the *Roberts* line of cases closely scrutinized the expressive purposes to find a clear expression for constitutional protection).

¹¹⁵ Frey, *supra* note 114, at 578. This conclusion is based upon four cases in which different courts determined whether the BSA's expressive purpose was an anti-homosexual message: *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998), *Merino v. San Diego County Council of the Boy Scouts of Am.*, 1997 WL 1145151 (Cal. Ct. App. May 21, 1997), and *Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724 (Chicago Comm'n on Hum. Rel. Feb. 21, 1996). *Id.* at 592-600. The courts relied on different evidence offered by the parties to make their determinations. *Id.*

¹¹⁶ *Id.* at 601. Evidence of an organization's expressive purpose should be limited to objective evidence in order to prevent personal interpretations from changing the meaning and to avoid biases and prejudices often reflected inappropriately in the law. *Id.* at 601-08.

Previously, in *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*,¹¹⁷ the District Court for the District of Maryland ruled that only KKK brochures were relevant to the determination of the KKK's expressive purpose, not the Grand Dragon's view.¹¹⁸ The court found the organization was created for a specific expressive purpose.¹¹⁹ The members and the message were co-extensive, affording constitutional protection to their expressive association.¹²⁰ In an effort to ensure protection of expressive association, courts should determine if the individuals joined the organization in order to express a view and whether the organization only admits individuals whose views are in alignment with the organization's view.¹²¹

Because courts have not developed a consistent approach to determine what evidence is appropriate to evaluate an organization's expressive purpose, judges are free to evaluate the expression from their personal viewpoints and stereotypes.¹²² The Court fell prey to its own moral beliefs when it followed the BSA's reasoning. In essence, the BSA claimed it only promote morality, thereby implying that homosexuals are forbidden because they are immoral.¹²³

¹¹⁷ *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281 (D. Md. 1988).

¹¹⁸ *Id.* at 289 n.2. In another case, a federal court of appeals failed to heed the school administration's claim of its discrimination policy because the school failed to show written evidence referring to the discrimination in its tenets. *See Brown v. Dade Christian Schs.*, 556 F.2d 310, 312 (5th Cir. 1977).

¹¹⁹ *Invisible Empire of the Knights of the KKK*, 700 F. Supp at 289.

¹²⁰ *Id.*

¹²¹ Breuner, *supra* note 21, at 499. As the Superior Court of New Jersey noted, the BSA's anti-homosexual policy was never disseminated through the BSA hierarchy until litigation began. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 290 (N.J. Super. Ct. App. Div. 1998). Also, there was evidence presented suggesting BSA members and leaders were unaware of such a policy. *Id.*

¹²² Hutchinson, *supra* note 102, at 97.

¹²³ JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* 235 (1983) (analyzing the religious foundation, and finding homosexuality is immoral). However, many religious organizations have different opinions. *Id.* Often, expression that is in conflict with the majority's basic beliefs is denied protection, and deemed irrational and devalued, thereby leading to total suppression. *Id.* Brent H. Allen, Note, *The First Amendment and Homosexual Expression: The Need for an Expanded*

However, the BSA has never consistently made any explicit statement espousing the belief that homosexuality is immoral. In addition, one court has classified moral considerations as “social judgments” that are inappropriate to determine constitutional protection.¹²⁴ In essence, by basing the ruling on its own beliefs, the Court advocated the belief that homosexuality is immoral.¹²⁵ Separation by force of law conveys a strong social stigma and perpetuates the stereotypes and circumstances on which the stereotypes thrive.¹²⁶

The purpose of determining an organization’s actual expression is to ensure that the exclusionary membership policy is a mechanism promoting an identifiable constitutional right,¹²⁷ not a pretext.¹²⁸ As Justice Stevens points out, he is “unaware of any previous instances” where the Court gave deference to a party’s claim.¹²⁹ Previous decisions by the Supreme Court required courts to conduct an independent review of each party’s claim and the facts

Interpretation, 47 VAND. L. REV. 1073, 1077 (1994). However, this type of expression is exactly what the First Amendment was created to protect. *Id.* at 1076-77. The speech of homosexuals is a primary example of this type of speech that the Constitution protects. *Id.* at 1086-87.

¹²⁴ *Ben-Shalom v. Secretary of the Army*, 489 F. Supp. 964, 976 (E.D. Wis. 1980). The Army discharged the plaintiff after she “evidenced” an interest in homosexuality. *Id.* at 969. However, sexual preference was considered as irrelevant as skin color or gender in accomplishing the plaintiff’s duties. *Id.* at 973-74. The Army’s discharge policy was substantially outweighed by the “chill” imposed on the First Amendment rights of the soldiers. *Id.* at 974.

¹²⁵ *Gomez*, *supra* note 7, at 127. Some examples of judicial findings on homosexuality include “loathsome and disgusting,” “grossly repugnant,” and “unfit to be named among Christians.” *Id.*

¹²⁶ *Larsen*, *supra* note 15, at 401. Although speaking in terms of racial stereotypes, where organizations discriminate based on race, the same may be applied to other stereotypes, including homosexuality. *Id.* Conversely, others argue that separation actually decreases prejudice and increases tolerance. *Marshall*, *supra* note 83, at 88-89. “[I]t reinforces the false notion that it is unsafe to have homosexuals around young boys.” *Frank*, *supra* note 6 at 36.

¹²⁷ *Marshall*, *supra* note 83, at 80. Others argue an exclusionary membership policy should always be protected. *Id.*

¹²⁸ *Frank*, *supra* note 6, at 63.

¹²⁹ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2471 (2000) (Stevens, J., dissenting).

presented.¹³⁰ However, some scholars suggest that the Supreme Court should recognize that the inclusion of a member is an expression of the fact that the excluded person is not welcome. By not admitting women into the club, the Jaycees' expressive purpose propels the notion that "sexism is good."¹³¹ However, every simple act could then be considered to have an expressive purpose protected under the Constitution.¹³²

2. Confusing Speech and Association

The Court's finding in *Boy Scouts of America*,¹³³ that a homosexual's presence conveys a message, forces homosexuality to be regarded as a form of speech. In the context of a freedom of expressive association claim, courts must confine the issue to whether the exclusion was based on the person's expressed views or whether the exclusion was impermissibly based on the person's status.¹³⁴

A person may reveal his status through visual observation or self-identifying speech.¹³⁵ However, because sexual orientation is an invisible characteristic, only self-identifying speech can reveal such a person's homosexual status.¹³⁶ Self-identifying speech, also referred to as

¹³⁰ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567-58 (1995); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

¹³¹ See Perlman, *supra* note 24, at 122. This view derives from Justice Douglas' dissenting opinion in *Lathrop v. Donohue*, where he stated that "joining is one method of expression." *Lathrop v. Donohue*, 437 U.S. 820, 882 (1961) (Douglas, J., dissenting).

¹³² See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980).

¹³³ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

¹³⁴ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1235 (N.J. 1999) (Handler, J., concurring). If exclusion is based upon the person's expressed views, then the court must determine if the person's expressed views actually conflict with the organization's expressive purpose. See *supra* notes 83-90, 114 and accompanying text.

¹³⁵ See Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 326 (1999). Religious identity is similar in that it is an invisible trait. *Id.* The only way to express either religious or sexual identity is by a form of communication. *Id.*

“outness” in terms of homosexuals, is crucial to constructing one’s identity or status.¹³⁷ Because “outness” is crucial to homosexual identity, it is inseparable from the person’s identity; therefore, discrimination based on “outness” is discrimination based on homosexual identity.¹³⁸ As Justice Brennan once stated, it is realistically impossible to separate a homosexual’s statements from his status.¹³⁹

As Justice Stevens suggests in his dissent in *Boy Scouts of America*, once a person is known to be homosexual, the person is permanently labeled as such, thereby justifying exclusion.¹⁴⁰ Organizations often justify exclusion on multiple assumptions: the homosexual person will openly advocate and express homosexuality,¹⁴¹ and that advocacy will conflict with

¹³⁶ Gomez, *supra* note 7, at 148-49. Homosexuality is not an easily identifiable feature such as skin color or gender. *Id.* Another person may only learn of one’s sexual orientation by force, expressive actions, or announcement. *Id.*

¹³⁷ Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993). See also Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”).

¹³⁸ See Hutchinson, *supra* note 102, at 123. However, Hutchinson argues in the alternative, that even if “outness” was separate from identity, it would provide an easy way out of the public accommodation laws. *Id.* at 124.

¹³⁹ See Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1017 (1985) (Brennan, J., dissenting). The Supreme Court denied the writ of certiorari, in which Justices Brennan and Marshall dissented. *Id.* at 1009. Justice Brennan found the evidence to indicate that the petitioner’s sexual orientation was made known from her daily conversations. *Id.* at 1016. The evidence merely indicated that the petitioner’s “speech” was only a natural consequence of her sexual orientation, and therefore a separate freedom of speech claim is not warranted. *Id.* at 1017 (emphasis added).

¹⁴⁰ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2476 (2000) (Stevens, J., dissenting).

¹⁴¹ Gomez, *supra* note 7, at 132-33. Homosexuals may project their identity through various forms of public expression. *Id.* This includes acts such as visiting places where homosexuals congregate, same-sex dancing, participating in political marches, publicly displaying affection, or wearing a symbol of homosexual equality. *Id.* One must note that Gomez’s examples do not include mere homosexual presence. *Id.* However, other scholars argue that expression of identity conveys a message that the person has “come out,” but also intends to act out that identity. Hunter, *supra* note 137, at 1696. The New Jersey Supreme Court disregarded this assumption, noting that Dale had no past, present, or future intent to use his position to advocate homosexuality. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1229 (N.J. 1999). See also *Dale*, 120 S. Ct. at 2477 (Stevens, J., dissenting). The majority opinion also acknowledges Dale’s lack of interest in advocating homosexuality, but disposes of the argument by stating that on his own admission, he is a co-president and member of a gay rights activist group. *Id.* at 2454.

the organization's expression.¹⁴² Often, these assumptions arise because a person's character is presumed from his or her sexual practices, which in turn are presumed from his or her sexual orientation.¹⁴³ However, being homosexual does not indicate the individual's political, religious, or moral beliefs.¹⁴⁴ The majority of homosexual stereotypes are groundless and inaccurate.¹⁴⁵ Courts must not afford constitutional protection to rumors or generalizations.¹⁴⁶

3. Silencing Self-identifying Speech

Another difficulty with the *Boy Scouts of America*¹⁴⁷ ruling is that it forces homosexuals to remain silent.¹⁴⁸ Organizations invoking a right to expressive association should not be able to use a freedom of speech defense because the presence of a homosexual does not necessitate the fact that the person will advocate homosexuality through speech.¹⁴⁹ The status of homosexuality

¹⁴² Breuner, *supra* note 21, at 508. Political activity or public expressions of intimacy have been suggested as expressions that would directly conflict with an organization's expressive purpose, not purely homosexual status. *Id.*

¹⁴³ Battaglia, *supra* note 135, at 357-58. This is based upon a distinction between sexual orientation discrimination, which is a morally controversial activity, and racial discrimination, which is a morally neutral characteristic and therefore does not invoke any character presumptions. *Id.*

¹⁴⁴ See *California v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Cal. Ct. App. 2000). See also Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 34 HARV. C.R.- C.L. L. REV. 1, 19-23 (2000) (criticizing the Court's inability to distinguish between "viewpoint" and "point of viewing"). "Point of viewing" is a shared position, such as exclusion based on a specific characteristic, from which one's views emerge; whereas "viewpoint" is specific opinions on specific issues. *Id.*

¹⁴⁵ Breuner, *supra* note 21, at 487.

¹⁴⁶ *Id.* at 508.

¹⁴⁷ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

¹⁴⁸ Hutchinson, *supra* note 102, at 103. Hutchinson suggests that when the Court in *Hurley* distinguished between discrimination based upon carrying a banner and discrimination based upon homosexuality, it silenced homosexuals. *Id.* The Court tailored the decision to permit discrimination based upon "outness." *Id.* If the expression of homosexuality is characterized as speech, the only alternative to protecting it is viewed as chilling expression and forcing affirmation of heterosexuality. Gomez, *supra* note 7, at 142. See also Hunter, *supra* note 137, at 1719. "To compel silence, then, is to force persons who are not heterosexual in effect to lie." *Id.*

¹⁴⁹ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1240 (N.J. 1999) (Handler, J., concurring). Justice Handler discusses how Dale's identity does not express a view about homosexuality or morality. *Id.* He distinguishes *Dale*

is not equivalent to speech.¹⁵⁰ In an effort to uphold discrimination based on actual expression of beliefs, the courts created a false dichotomy between a person's speech and status.¹⁵¹ However, the courts must realize this self-identifying speech is part of a person's identity.¹⁵² A person's sexual orientation is an invisible trait, only made known by a form of speech.¹⁵³ As pointed out in *Roberts*, the ability to define one's identity is central to the concept of liberty.¹⁵⁴ If the very means by which people communicate their identities justifies discrimination, then protection afforded by anti-discrimination laws is illusory.¹⁵⁵ Because of the *Boy Scouts of America*¹⁵⁶ decision, homosexual status may now be considered a form of speech, justifying the exclusion from an association or forcing the individual to remain silent.

V. CONCLUSION

Before *Boy Scouts of America v. Dale*,¹⁵⁷ there was hope that the lower courts could tailor their freedom of expressive association analysis decisions to exclude *Hurley v. Irish-American*

from *Curran v. Mount Diablo Council of the Boy Scouts of America*, where a Boy Scout was rightfully denied membership because he used his membership as a platform for advocating the morality of homosexuality. *Id.* at 1240 n.5 (citing *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998)). *See also supra* note 141.

¹⁵⁰ See Hunter, *supra* note 137, at 1719.

¹⁵¹ See Allen, *supra* note 123, at 1097. This dichotomy is rooted in upholding the military's "don't ask, don't tell" policy. *Id.* at 1102. The individual may be discharged on the grounds of homosexual status; however, discharge based upon speech alone would be unconstitutional. *Id.* Allen argues that the courts must recognize various forms of speech, including those which may fall into a new "guise," such as "coming out." *Id.*

¹⁵² See *supra* notes 137-38 and accompanying text.

¹⁵³ See *supra* notes 137-38 and accompanying text.

¹⁵⁴ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

¹⁵⁵ See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1240 (N.J. 1999) (Handler, J., concurring).

¹⁵⁶ *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

¹⁵⁷ *Id.*

Gay, Lesbian and Bisexual Group of Boston.¹⁵⁸ However, by analogizing to *Hurley*,¹⁵⁹ the Supreme Court found homosexual status equivalent to pure speech. In addition, an organization's claimed expressive purpose is not independently reviewed, but is given deference by the court. Previously, critics feared the *Roberts* Trilogy would annihilate the diversity of organizations.¹⁶⁰ Unfortunately, failing to realize the unique circumstances of homosexuals creates the opposite result. This decision applies not only to homosexuals, but also to any viewpoint an organization would consider different.¹⁶¹ Critics now believe the Supreme Court has given organizations *more* legal authority to discriminate.¹⁶² Organizations now have a leg up, but at whose expense?¹⁶³

¹⁵⁸ Hutchinson, *supra* note 102, at 104-09 (citing decisions that ignore the *Hurley* decision: *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) and *Elks Lodges No. 719 & No. 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189 (Utah 1995)).

¹⁵⁹ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

¹⁶⁰ See, e.g., Linder, *supra* note 22, at 1898-1902.

¹⁶¹ "The majority's interpretation . . . would leave the Boy Scouts and other like organizations free to discriminate not just against . . . those whose beliefs arguably conflict with the group's most central philosophy -- but against anyone at all on a sheer whim." *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1279 (7th Cir. 1993) (Cummings, J., dissenting).

¹⁶² Julie Brienza, *Court's Decision on Gay Scouts Unlikely to End Discussion on "Freedom of Association,"* 36 TRIAL 12, 14 (2000).

¹⁶³ See, e.g., Jane Gross, *Scouting Debate Leaves Children Caught in Middle; Uproar Over Excluding Gays Disrupts Young Lives*, N.Y. TIMES, Oct. 1, 2000, at 1-33. In the aftermath of the Supreme Court's decision to allow the Boy Scouts of America to exclude homosexuals, many wonder "where does that leave the children? Are they being deprived of a valuable experience so adults can stand on principle? Or will they be enriched by being part of a significant civic debate . . .?" See also Kate Zernike, *Scouts Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1 (discussing recent debates by municipalities, companies and civic organizations to withdraw financial and physical support from the Boy Scouts).