The First Amendment Right to Discriminate
Tyler Clementi, a freshman at Rutgers University in New York, committed suicide on September 22, 2010 by jumping from the George Washington Bridge which connects Manhattan and New Jersey. Clementi had recently discovered that his roommate was secretly taping his sexual encounters with other men and had ridiculed Clementi for these encounters and his sexual orientation on the internet. After Clementi’s highly publicized death, Dan Savage started the It Gets Better Project, creating videos “to inspire hope for young people facing harassment.” Savage and his partner “In response to a number of students taking their own lives after being bullied in school, wanted to create a personal way for supporters everywhere to tell LGBT youth that, yes, it does indeed get better.”1 The fragile psyche of a male youth doubting his sexual orientation necessitates a strong, easily accessible gay role model. But recent decisions of the Supreme Court have obliterated many of the avenues with which these role models can effectively change the trajectories of struggling teens. Resultantly, the cultural discursion about sexual norms remains stagnant, imperiling the lives and mental health of sexually confused youth. Moreover, the instillation of homophobia or anti-gay rhetoric in impressionable youth by centers of norm formation contributes to repressive attitudes within society that exacerbate the nexus between lack of understanding and hatred.

1“It Gets Better” Project <http://www.itgetsbetter.org/pages/about-it-gets-better-project/>
The *New Yorker* published the above political cartoon\(^2\) in response to The Supreme Court’s 5-4 2000 decision in *Boy Scouts of America and Monmouth Council, et al., Petitioners v. James Dale* (hereafter referred to as *Dale*), holding that New Jersey’s anti-discrimination in places of public accommodation statute could not force the Boy Scouts of America to continue employing openly-gay scoutmaster James Dale.\(^3\) With *Dale*, the Court endorsed the right for private groups to invidiously discriminate against certain classes of persons in the composition of their membership. With respect to the Boy Scouts of America, this conclusion is particularly problematic because it permits the Boy Scouts of America, an organization with the purpose of educating young males, to publicly impart the message that homosexuals are inferior. Not only does this instill homophobia as a value in impressionable persons, but it communicates that there is something inherently *wrong* with being gay that renders homosexuals incapable of being suitable role models; therefore, the youth struggling with their sexuality may become isolated and depressed, resulting in internalized self-hatred wholly detrimental to positive social development. In “Are the Boy Scouts Being as Bad as Racists,” Koppel? A name? opines that the Boy Scouts of America has the capability to “address the needs and vulnerabilities of [gay teenagers] without holding that homosexual conduct is morally licit” to ensure that these teens are not pressured to “hide” or are conditioned to believe that “their secret makes them intrinsically worthless,” a sentiment that “is more intense the more they already value and trust the adults who…ostracize gay people.”\(^4\) The Boy Scouts’ discriminatory policy proves problematic for both the Scoutmasters and impressionable, young Scouts in the midst of the socialization process.

Ergo, it is necessary to examine the Supreme Court’s majority opinion in *Dale* to exhume and illuminate its logical fallacies. Concurrently, in lieu of strengthening the grasp of homophobia, a reversal of the Court’s decision would progress the movement toward equality


for all persons, regardless of sexual orientation. Part I of this paper analyzes the Supreme Court’s decision in *Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al.* a 1994 case providing the precedent at the heart of the *Dale* decision. Part II regards the question of whether Hurley is an appropriate precedent for *Dale*, discussing the discrepancies between the facts of the cases. Part III deconstructs the majority and minority opinions in *Dale*. Part IV discusses the methods adopted in an attempt to remedy the repercussions of the Court’s solidification of a First Amendment-approved right to discriminate through *Dale* and *Hurley*.

**Ia. The *Hurley* Story**

The city of Boston, Massachusetts declared in 1938 that March 17 would be known as “Evacuation Day” to commemorate the historic event in 1776 wherein British troops and loyalists were removed from the city, culminating in the St. Patrick’s Day-Evacuation Day Parade. In 1947, the Parade’s “formal sponsorship by the city” concluded, and the organizational duties transferred to the South Boston Allied War Veterans Council. Every year since 1947, the Council has applied and received the permit to conduct the parade. Typically, at least 20,000 marchers participate in the parade in front of a crowd of over one million spectators. Each year, the Council uses Boston’s official seal, receives direct funding from the city, and is provided printing services by the city for the purposes of conducting the parade.

In 1992, GLIB, the Irish American Gay, Lesbian, and Bisexual Group of Boston, Inc. applied to march as a group in the parade. After the Council denied their request, GLIB obtained a court order to participate, marching “uneventfully” amidst the participants. When in 1993 GLIB applied to march and were rejected by the Council again, the GLIB filed a suit, alleging violation of Massachusetts State and Federal Constitutions and of Massachusetts’s Public Accommodations Law, against the Council, Boston, and individual petitioner John J.
“Wacko” Hurley.

The Massachusetts Public Accommodations Law prohibits discrimination on the basis of sexual orientation “relative to the admission of any person to, or treatment in any place of public accommodation, resort, or amusement.” GLIB averred that their exclusion from the parade, as a place of public accommodation, was invidious, especially in light of the Council’s history of particularly lenient standards for inclusion. In Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., the Supreme Court voted unanimously to reverse the decision of the Supreme Court of Massachusetts; their finding was that Massachusetts’s public accommodation law was erroneously applied to “require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey,” in violation of the First Amendment.6

The Court’s argument is divided into four sections. The first section involves a systematic deconstruction of the lower courts’ decisions on the case, with the Court conducting an independent examination of the record. Resultantly, the Court decried the lower court’s judgment as intrusive on the Council’s free speech rights; GLIB’s activity is not within the bounds of non-expressive conduct. The second section discusses the expressive nature of a parade, resolving that parades are expressive conduct – a “symbolic act” that necessitates protection under the First Amendment. The Council, through discretionary selection of parade participants, conveys a “collective point”7 to both marchers and spectators concerning Council’s expressed message. Ergo, the forced inclusion of an expressive group with a purpose in conflict with that of the Council unfairly interlopes in the Council’s expressive ability. The third section discusses the Massachusetts’ public accommodations law, upholding its constitutionality. As anti-discrimination laws operate to regulate categories of action and not content of speech, they are facially neutral and constitutional with regard to the 14th or 1st

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amendments. The last prong of the Court’s argument delineates the scope of the public accommodations statute with regard to the inherent expressive quality of a parade, acquiescing that the Council has two distinct rights: the right to speak, and the right to be silent. Accordingly, the Council has the right to expound their message through the parade and to protect their message from alteration resulting from the mandates of an intrusive public accommodations law. Within the auspices of this case, the Council is free to refuse GLIB’s request for inclusion without fear of repercussive retaliation by the state.

Ib. Hurley. Parade as Public Forum

Almost the entire argument posited by the Court in subsequent sections of the Opinion is proffered at the conclusion of the first; the Court ends its summary of the lower court decisions with Justice Nolan’s dissent from the Massachusetts Supreme Court’s majority opinion. Nolan’s dissent maintains three central prongs: 1) that even if the Parade has no explicit message, GLIB’s message cannot be “forced upon it;” 2) that Parades are inherently expressive and protected speech such that a State, when attempting to eliminate discrimination through policy, must employ “narrowly drawn means” to achieve their goal to minimize the possible suppression of expressive content; and 3) that exclusion based on the message of a group is not equivalent to exclusion based on the protected status of that group. Since GLIB was inaugurated with the explicit intention to march in the St. Patrick’s Day-Evacuation Day Parade, the Council did not discriminate on the basis of sexual orientation but rather on the content of GLIB’s message. The Council maintained that the members of GLIB could march as individuals, not as a group, in the Parade to render application of the public accommodations law inappropriate.

Nevertheless, it is fundamentally antithetical to assume that the exclusive purpose of the Parade is to expound upon the Council’s expression: the Parade is an event for the people of
Boston, celebrating Boston’s ethno-cultural history, financed by the City of Boston, and is associated with Boston, not with the Council. When a government allocates its money, its personal property, to a non-governmental entity, the Government expresses its speech through the selection a group to receive Parade funds to accrue responsibility over the Parade’s orchestration. The Government was presented with two choices prior to its selection “to keep the money itself and promote its own message or to give it to private individuals who can use it for whatever message they desire” and acquire the Government’s free speech rights within the bounds of the monetary restriction of the speech.\(^8\) If the Parade is an expressive form of speech, then it has a “common theme:\(^9\) to represent all that historically was and currently is Boston. The Council is, accordingly, a city-commissioned entity infused with the Boston Government’s free speech rights; conversely, the Council is comprised of a cadre of Veterans unable to represent the multiethnic composition in membership or, by proxy, in their ideology. The Council’s is not a “composer of individual speech” but rather the “common carrier” of the “messages of a diverse range of groups forming a series,\(^10\) an onus reinforced because of their commission to construe the Parade by the city. Correspondingly, the Council may organize the Parade, but its organizational duty is to transmit the entirety of “messages of a diverse range of groups” that are classifiable underneath the common theme. For the Council to exercise its individual expression, it would have to march as a discrete group in the series. Thus, the exclusion of GLIB is indecorous because it excludes the individuals encompassing a subset of the Boston population that, during the typical day, lack a perpetual and tactile presence. The fact that Boston continues to sanction the Parade’s organization by the Council in spite of their discriminatory beliefs is invidious in its essence.

\(^8\) Siedman, Louis Michael. “The Dale Problem: Property and Speech under the Regulatory State.” The University of Chicago Law Review, Fall 2008. Pg 1572. In Hurley, the Council has a duty to spend the money provided by Boston at whim but would be in dereliction of duty (and likely guilty of defrauding the government) were the money squandered to prevent the Parade from occurring.


The exclusion of GLIB for its expressive nature, not the sexual orientations of its constituents, would be merited if the Parade were the Council’s exclusive expression. Since the verity that this that the Parade is the amalgamation of discrete units of expressive speech representing the whole of the populace of Boston, the Council is neglecting the inherent expressive nature of the individual entities comprising the Parade. By stripping GLIB of their identifying banner and forcing their members to march facelessly in the Parade whilst allowing other organizations to maintain their nonverbal speech rights by displaying their own flags, the Council is discriminating against a specific type of person (individuals that identify as Irish and gay) by forbidding them to march as a group under a banner while others (like individuals that identify as Irish and Catholic) are allowed. Since the difference between GLIB and all other participatory units is sexual orientation, the Council is discriminating on the basis of sexual orientation. Furthermore, banning GLIB removes the plight of LGBT Irish-Americans, a minority group, from the realm of public discourse, the Parade, endorsing the conception that identifying as Irish-American concurrently denotes heterosexuality. Madhavi Sunder\textsuperscript{11} rephrases the debate, stating that the Court’s decision is akin to “legally protecting speech as private space through property-like entitlements including the rights of absolute use, exclusivity, and transfer…the Court’s approach stems from a romantic view of speakers as authors rather than as participants in a social dialogue.”

The sentiment that the Court is, either consciously or subconsciously, stifling the marketplace of ideas by sanctioning the removal of a minority opinion from the sphere of public discourse, contravenes the First Amendment’s paramount guarantee of protection from the tyranny of the majority. Yet, the Court’s reasoning throughout the remaining segments of the opinion, as Sunder chides, “assumes static and essentialist conceptions of identity, speech,

and culture that are ultimately anathema to a thriving polity and identity politics.” The Court speciously decrees that the Parade and GLIB have irreconcilable expressive characters, precluded from being expressed simultaneously without trampling on the expressive speech material of the other.

**Ic. Hurley: Intellectual Property & Monopoly**

The origin of this error lies in the Court’s determination in the second prong of the Opinion that, the Council’s conduct does not have the “character of state action” and is “purely private.” Carl Stychin contextualizes this grave gaffe, bemoaning that the Court’s decision upholds the right of one group to construct a parade that reflects and constitutes an “authentic national identity;” therefore, the Council accrues the unique ability to “circumscribe the Irish community” through their selection of “groups that are consistent with what they perceive to be their version of a celebration of St Patrick in their neighbourhood,” determining which sub-identities are acceptable and which are irresoluble. Exclusion from the Parade, accordingly, approximates a badge of inferiority within a discrete class of a broad ethnic identity. A ritualized and visible parade like that in question in *Hurley*, is a public good and place of public accommodation; if it were the intellectual property of the Council, then the State should not be directly financing the accumulation of property for a private entity.

The Court argues that the Council is akin to a newspaper, offering a “presentation of an edited compilation of speech generated by other persons,” so their “selection of contingents to make a parade is entitled to similar protection.” Conversely, a newspaper is distributed as to those that elect to pay for the service, and individuals usually select their newspaper based on the newspaper’s message. For example, Washington D.C. has two primary newspapers, *The

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12 Sunder, Madhavi “Authorship and Autonomy”...Pg 171
14 Stychin, Carl. “Celebration and Consolidation”...Pg 290
Washington Post and The Washington Times. Customers in the city are aware that the former has a left-leading slant whereas the latter tends to have more conservative views and select which paper to purchase based on this prior knowledge.

A parade is a “public drama of social relations, and in them performers define…what subjects and ideas are available for communication and consideration.”\footnote{16}{\textit{Hurley} U.S. 515 U.S. 568 (1995)} Emphatically characterizing the St. Patrick’s Day-Evacuation Day parade as possessing great “size and success” to make it “an enviable vehicle for the dissemination of GLIB’s views,” the Court nevertheless feigns the assertion that GLIB “presumably would have had a fair shot…at obtaining a parade permit of its own.”\footnote{17}{\textit{Hurley} U.S. 515 U.S. 578 (1995)} Demonstrably, the “size and success” of the Parade transform it into a large public forum that likely interacts with the individuals normally inactive in the political sphere. (By design, parades are presumed to be inclusive of sociocultural cleavages since floats, marching bands, and audience camaraderie tend to be universally appealing regardless of race, class, sexual orientation, et cetera.); the notion that GLIB could attain comparable amounts of exposure and access to the public through the orchestration of their own, independent parade as would be conferred through participation in the St. Patrick’s Day-Evacuation Day Parade is absolutely ludicrous. The history, notoriety, publicity, and size of the St. Patrick’s Day-Evacuation Day Parade causes it to resemble a monopoly\footnote{18}{In Seidman’s “The Dale Problem: Property and Speech under the Regulatory State,”(page1598), after a detailed analysis of the speech rights as distributed through government action, he remarks that only some property rights are treated “as constitutionally fixed in areas like intellectual property, libel, campaign finance, and public forum doctrine.” This signifies that the Council, in the opinion of current jurisprudence, cannot be classified as operating as the “public interest” despite a locus firmly in the public sphere (through the parade). Resultantly, in spite of the installation of free speech in the Council, they cannot constitute a state actor because of their noncommercial character and private membership. Their non-governmental character may be challenged on the basis that the Council has received the Parade rights since 1947, materializing as a relationship between City and Private Actor that approximates a long-standing contract to redefine the Council as an extension of the state: a government-funded organization operating as the city and for the benefit of the city to engender a “public entity” inevitably subject to the Massachusetts Public Accommodations law. Nevertheless, the Council’s decades-long monopoly on the Parade and, by proxy, consistently awarded free speech powers as transferred by the City, emits the sensation that the Council is the sole shareholder of the parade (a theoretically City-owned intellectual property) to virtually obliterate the probability that the Council’s reign be challenged by a viable competitor in Parade’s marketplace for the Parade. With complete control over the Parade composition, the Council is quasi-guaranteed victory in the annual contest for the rights to the Parade, amounting in the Council’s ability to delineate the boundaries of the public discursive space, silencing minority or
that it is nearly impossible for a group denied access to recoup their lost opportunity, silencing alternate viewpoints in the public discourse.

The Court attempts to distinguish *Hurley* from *Turner Broadcasting Inc. v. FCC*, a case sanctioning Government intervention to limit “monopolistic autonomy” to ensure the “survival of broadcasters who might otherwise be silenced and consequently destroyed,”19 by professing that the Council does not “enjoy an abiding monopoly of access to spectators” such that GLIB is unharmed and capable of sounding its voice regardless of Parade access.20 Monopolies produce a product responsive to the consumer’s demands and produced efficiently such that it restricts potential viability of new entrants to the market; however, the Council has been awarded the Parade permit each year since 1947 (to deter new applicants) yet receives its funding from the City of Boston for the Parade (the service it provides) without restrictions on content. Thus, without paying consumers to influence the composition of performers or competition for the permit, the Council holds a monopoly on the Parade’s expression in a manner analogous to *Turner Broadcasting*. Homosexuality has persisted as long as the human race, but its acceptance in the public sphere is hindered whence groups like GLIB are rejected as viable representatives of culture, threatening “the survival of speakers”21 by removing their claims to legitimacy.

Arguably, the Parade is a conduit, providing the public forum in which individual groups express their own relationships to the overarching theme – the celebration of “Irish-ness” – and “compelled access” to Parade participation does not, as the Court claims “trespass on the organization’s message itself” unless the group wishing to join is unrelated to the celebration of “Irish-ness” and all its forms. In granting the Council the sole right to construct

the speech and, by proxy, the “social meaning”\textsuperscript{22} of the Parade, the Council is may fashion “Irish-ness” at whim, “insulating a particular conception of identity from criticism...to eventually ruin cultural discourse.”\textsuperscript{23} Simply, if the Court recognizes the expressive nature of a parade, that it is a public spectacle, admits no unity in the selection of participants except in the celebration of ethnic heritage, then the expressive rights of GLIB are being flouted in exclusion to a greater degree than are those of the Council in inclusion. The Court, it follows, erred in its decision.

\textbf{Id. Hurley: The Supreme Court’s Unanimous Decision to Discriminate}

The most unnerving aspects of the \textit{Hurley} decision was the Court’s validation of one “expression” over the other: “the ‘expression of the Veterans Council trumps the competing claims of expression and non-discrimination, namely, the equal rights of lesbians, gays, and bisexuals to speak as a group within the seemingly public space which has been legally constituted as private.”\textsuperscript{24} Nary a dissent or concurrence in sight, the Court’s consensus denotes their belief that identity sociocultural cleavages cannot be fused – that each identity group is politicized and imbued with an inextricable, irrefutable meaning – such that an “out” individual cannot be seamlessly enveloped by the umbrella of Irish without redefining the essential definition of “Irish-ness.” The Court dictated to the State that the magnitude of harm caused by the inclusion GLIB in the Parade was so great that it trumped the State’s legitimate policy goal of quelling discrimination on the basis of sexual origin in places of public accommodation. After \textit{Hurley}, the Court legitimated the right for private organizations, even

\textsuperscript{22} Sunder, Madhavi. “Authorship and Autonomy” ... Pg. 166
\textsuperscript{23} Sunder, Madhavi. “Authorship and Autonomy” ... Pg. 168; Freedom from criticism harkens back to the monopoly metaphor. The Council monopolizes the sphere of public discourse, cobbled together its own vision of the essential meaning of being Irish through the composition of the units presented in the Parade. Not only does this further the need for dissent in the marketplace of ideas but stymies attempts to provide contestation. Were the Council truly attempting to represent “Irish-ness” as its primary message, specifically the community of South Boston, then its exclusion of GLIB trespasses on its message more so than would GLIB’s inclusion. Since maintenance of the marketplace of ideas was the primary objective underlying the inception of the First Amendment, the Court performed a disservice to the essential character of the First Amendment in the \textit{Hurley} decision, instead opting to transform the sphere of public discourse into a private commodity moderated by a singular, non-inclusive, private organization.
\textsuperscript{24} Stychin, Carl. “Celebration and Consolidation” ... Pg. 284
those functioning wholly or mostly in the public sphere, to quell intra-group dissent and maintain the status quo through the elimination of those with critical or contesting opinions. Thus, the right to freedom of expression and association empowers the right to discriminate, counterintuitively protecting the ideology of an organization by removing potential threats from the discursive space.

IIa. The Dale Story

When James Dale was 8, he joined the Boy Scouts of America through the “Monmouth Council’s Cub Scout Pack 142 and joined the ranks of the Cub Scouts’ highest distinction, the Order of the Arrow, during his tenure. He transitioned from the Cub Scouts to the Boy Scouts, and remained a Boy Scout from ages 11 to 18, achieving the Boy Scouts’ highest honor, the rank of Eagle Scout. At 19, his application to be an Assistant Scoutmaster was accepted; however, in 1990, about a year later, the Boy Scouts of America revoked his membership due to a “concern” he failed to meet the organization’s “high standards of membership.” This “concern” resulted from a local newspaper article wherein Dale was interviewed as the co-president of the Rutgers University Lesbian/Gay Alliance. Thus, despite being a model Cub Scout, Boy Scout, and Assistant Scoutmaster, his sexual orientation constituted such a considerable violation of the Scouts’ policy as to negate his prior outstanding record. He filed a suit against the Boy Scouts, claiming a violation of the New Jersey Public Accommodations Law based on the Boy Scouts’ discrimination on the basis of sexual orientation.

The Boy Scouts of America is the 12th largest private non-profit organization in the United States: its endowment exceeds $2.2 billion, it accrues $155 million yearly in revenues, and its youth members perform about $206,690,025 worth of service (12,000,000 hours) in

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their communities. Its current mission is to “prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Scout Law,” regarding general ethical conduct. To help extend their reach, the organization adopted an inclusive membership policy, stipulating that “[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. ... To meet these responsibilities we have made a commitment that our membership shall be representative of all the population in every community, district, and council.”

Established in 1910 and granted a federal charter by Congress in 1916, the Boy Scouts currently boasts a membership of over 2.7 million youth and an alumni count over 110 million. About 50% of all U.S. males aged 7-10 are involved in the Cub Scouts; 20% of all U.S. males aged 11-18 are members of the Boy Scouts.

One of the self-proclaimed “largest and most prominent values-based youth development organizations,” the Boy Scouts of America professed their belief that homosexuality violated provisions of Scout Oath and Law, specifically the mandates that one must be “morally straight” and “clean.” Furthermore, the Boy Scouts asserted that New Jersey’s forced inclusion of Mr. Dale through their Public Accommodations law would be in violation of their right to expressive association; as an organization that did not “want to promote homosexual conduct as a legitimate form of behavior,” they claimed a right under the First Amendment to discriminate in their choice of members. Ultimately, the case, Boy Scouts of America et al v. Dale (2000), reached the Supreme Court. The Court overturned the decision of the New Jersey State Supreme Court by ruling 5-4 in favor of the Boy Scouts, holding, “Applying New Jersey's public accommodations law to require the Boy Scouts to admit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions

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28 The Boy Scouts of America. “Fact Sheet.” [http://www.scouting.org/scoutsOURCE/sitecore/content/Scouting/About/FactSheets/OverviewofBSA.aspx](http://www.scouting.org/scoutsOURCE/sitecore/content/Scouting/About/FactSheets/OverviewofBSA.aspx)
29 Boy Scouts of America, et al. v. Dale. 530 U.S. 666 (2000); Justice Stevens, dissenting opinion
31 The Boy Scouts of America. “About Us.” [http://www.scouting.org/scoutsSOURCE/sitecore/content/Scouting/About.aspx](http://www.scouting.org/scoutsSOURCE/sitecore/content/Scouting/About.aspx)
32 Boy Scouts of America, et al. v. Dale. 530 U.S. 651 (2000); Chief Justice Rehnquist, majority opinion
that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire.”

**IIb. Hurley as Precedent for Dale: Transitioning from Private Individuals to Private Association**

Justice Stevens’s dissenting opinion in *Dale* harangues that *Hurley* is only superficially similar to the case, and “a closer inspection reveals a wide gulf” between the cases with regard to GLIB intent to convey a message and Dale lacking intent to express, the likely public perception that the Parade’s components are a function of the Council’s message, and the Council’s desire to express their message at a specific temporal place “and a right to refuse to contradict or garble its own specific statement.”

Although Part I elucidated potential flaws with the Court’s logic regarding the *Hurley* decision, many First Amendment scholars posit that the Court’s decision was not partial against GLIB’s views. Instead, they argue that the Court appraised the Council as a “fundamentally private organization” that, through the selection and rejection of Parade participants, promote their conception of what “is” and “should” constitute “Irish-ness” in Boston: the Council’s expression is in essence the summation of each the distinct ideology exhibited by the hand-selected Parade participants, denoting that forced inclusion of GLIB or other groups counter to the Council’s vision would tarnish both the Council’s agenda and “traditional values” of the parade. As its sole constructor, the Parade is unescapably a function of the Council’s agenda; consequently, the average spectator is unable to disassociate the discrete elements of the Parade from the Council’s message, signifying that GLIB or other “forced” Parade participants will necessarily frustrate the audience’s proper interpretation of the council’s agenda. Summarily, the Court ruled based on each organization’s action in lieu of their message’s content. Even though lenient standards guided the Council’s selection of organizations acceded to march, with regard to their expression, their choice to reject is as important as their choice to include.

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34 *Boy Scouts of America, et al. v. Dale*. 530 U.S. 696 (2000); Justice Stevens, dissenting opinion
Michael Osborne, a pro-\textit{Hurley/anti-Dale} scholar, remarked, “the \textit{Hurley} Court correctly held that a private club could not force another private club to include it in the latter's public parade where doing so would compel certain speech by the club sponsoring the parade... GLIB wanted to use the parade as a platform from which it could propound its views and have them be seemingly backed by the sponsoring organization's imprimatur.”\textsuperscript{35} The Court’s decision in \textit{Hurley}, to some scholars, is thoroughly independent from the issue of sexual orientation. Massaro avers that, arising from GLIB’s declared intention to participate in the Parade in order to propagate cognizance of LGBT individuals within the Irish-American community of Boston, GLIB cannot be disassociated from their expressive purpose – GLIB is expressive conduct and, resultantly, their inclusion in the Parade would permeate and alter the Council’s expressive conduct regardless of the subject of their paramount issue. Sexual orientation and free speech typically trigger “intermediate scrutiny” in judicial review, erstwhile race, routinely designated a “suspect” class, mandates “strict scrutiny.” Despite the high degree of protection afforded to stymie state/government actors from making invidious, racially-charged distinctions in the public sphere, Massaro contends that if GLIB were representative of a racial minority with the same expressed conduct, the Hurley Court would subvert the expression of a highly protected class to safeguard the Council’s freedom of association rights from the threat of “forced expression” through inclusion of ideologically-irreconcilable groups: “In fact, \textit{Hurley} implies that the same result would follow had the parade officials chosen to bar African-American floats, instead of gay American floats.”\textsuperscript{36}

Essentially, \textit{Hurley} concedes that “government cannot regulate the content of private actors’ speech/association decisions, no matter how distasteful that content may be;”\textsuperscript{37} ergo, the stage for the majority opinion of the Court in \textit{Dale} wherein minority rights are eliminated to maintain the majority status quo. If a private organization has freedom of association rights

\textsuperscript{37} Massaro, Toni. “Gay Rights, Thick and Thin.” ... Pg 68
in the manufacture of its membership, their First Amendment rights will triumph over any State-issued anti-discrimination law to stagnate cultural dissent in the continual process of ideological formulation of a group through removal of dissent whilst simultaneously rendering obsolete the weapon previously employed to combat unequal access for minorities.

Further deleterious is the Court’s assertion that a group is not obliged to declare a cohesive message, or retain a message whatsoever, as a precondition for the right to discriminate in their membership policy. Justice Sandra Day O’Connor illuminated this creed in her 1984 concurrence in *Roberts v. United States Jaycees*, which was wholeheartedly adopted by the Court in the *Hurley* decision, stating: “Protection of the association’s right to define its membership derives from recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”

O’Connor continues this sentiment by decreeing citizen “control the content of public discussion” to be the most basic guarantee of the First Amendment; following, the hypothetical instance whence government action restricts an individual group’s access to realm of public discussion materializes as a caustic violation of the First Amendment, as *Hurley* concludes. With *Hurley*’s veneration of the “general rule of speaker autonomy” the private entity is imbued with the choice “not to propound a particular point of view, and that choice is presumed to lie beyond the government power to control.”

In *Roberts*, O’Connor bequeaths the same degree of free speech protection to an individual person and to an association, equating the two in the “public discussion” arena, and consolidating an organization of multitudinous persons into a singular and cohesive individual

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39 *Hurley* U.S. 515 U.S. 578 (1995); “Requiring access to a speaker’s message would thus not be an end in itself, but a means to produce speakers free from the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.” Here, the Court seems to indicate that changing one entity’s speech starts a vicious cycle of altered speech in the marketplace of ideas, wherein one opinion is rooted out at the will of the State, further obliterating contestation. Thus, every speech act will be manufactured to achieve a suboptimal equilibrium ideology.
40 *Hurley* U.S. 515 U.S. 575 (1995);
Undoubtedly, each person, distinctive in their ideology as a consequence of each inimitable experience comprising their lifelong socialization cycle, is enveloped within the group-turned-super-individual entity, imparting two potential effects per object: the individual can either 1) separate from the group and express their full range of postulations and opinions or 2) remain in the group to enjoy the power of expressive association yet lose their ability to express incongruous aspects of their identity; the group-turned-super-individual can either 1) fail or succeed at harmonizing the myriad inharmonious units from which it is comprised or 2) discriminate by eradicating individuals most threatening to harmony, bolstering the probability for long-run group stability.

IIc. Hurley as Precedent: Facts Diverge, Yet Opinions Converge

Regardless of whether the Court in Hurley erred with the decision, Hurley remains a poor precedent for Dale. Osborne’s aforementioned dichotomous approach to the cases guided the trajectory underlying his ultimate resolve, positing that while Hurley was a sound decision, the majority in Dale “incorrectly relied on Hurley in finding that the Boy Scouts had a constitutional right to discriminate against homosexuals.”² The New Jersey Supreme Court in their Dale decision, decided prior to that of the Court, concurred with Osborne’s supposition and concluded that the Boy Scouts of America’s lawyers were incorrect to center their case around Hurley as precedent because “the reinstatement of Dale does not compel the Boy Scouts to express any message.”³ The Court’s fallacious implementation of Hurley manifests through three dichotomies between the major facts of the cases: 1) forced expression altering an association’s collective expressive activity versus an association’s membership composition; 2) exposure, propagation, and intensity of homophobic message’s expression; and 3) the public-private character of the association. The end ruling in the cases legitimated the right of expressive associations to discriminate on the basis of sexual orientation without violating

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⁴² Osborne, Michael T. “Erecting Prejudice”…Pg525
⁴³ 160 N.J., at 624, 734 A. 2d, at 1229
Eitches 18

public accommodations laws; synchronously, Dale’s divergence from Hurley was significant enough that the Court vaulted from a unanimous opinion to a split 5-4 vote in Dale.

Elaborating on the first factual dichotomy, Hurley depicts one expressive association aspiring to participate in another expressive association’s collective expressive activity without the consent of the latter group, materializing as the “forced participation” of GLIB in the Council’s articulation of their expressive agenda through the Parade. 44 GLIB did not desire membership in or a merger with the Council; the Council, because of their conflicting ideologies, probably did not have any GLIB members apply for membership. GLIB merely wanted to use the forum of the Parade to express a sentiment to the public, but the Council’s exclusive rights to author the Parade intentionally prohibited GLIB access; therefore, exclusion became intertwined with their speech goals. GLIB’s expressive message, as an association remained, intact without inclusion in the Parade; their exclusion and the Court’s decision may have strengthened GLIB’s expressive agenda and their resolve carve a niche in cultural fabric of “Irish-ness” for LGBT-identified individuals.

In Dale, Mr. Dale is stripped of a piece of his identity through his expulsion from the Boy Scouts; Mr. Dale lost his ability to participate and possibly alter the cultural definition of the Boy Scouts, akin to GLIB, and his identity as a Boy Scout. Mr. Dale’s expression is constricted against his will, maligning the liberty theoretical coffered by the First Amendment: Dale and other gay Boy Scouts and Troop leaders are forced to “choose to keep their association with the other boy scouts,” sequestering their gay identity in exchange for the right to associate with the Boy Scouts of America, or “surrender their right of association with other boy scouts by identifying themselves as homosexuals.” 46 In the case of Mr. Dale, the Boy Scouts of America’s discrimination is psychological warfare because it deprives Mr. Dale of the

44 Hurley, 515 U.S. 574 (1995): “[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay,... and the presence of [GLIB] ... would suggest... [that the organizers held the] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals. [GLIB] ... would suggest... [that the organizers held the] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.”

“satisfaction of personal fellowship” provided by expressive associations like the Boy Scouts\textsuperscript{47}, repossesses, complicates his interpersonal relationships with group members, forbids the personal gratification found in membership solidarity, and obligates a reevaluation of self-identification. In short, \textit{Hurley} targets a group for their message whilst \textit{Dale} “seeks to keep an outsider out of its ranks,”\textsuperscript{48} exiling the individual because of their immutable characteristics.

The psychological harm generated by expulsion from Boy Scouts of America is compounded with those arising from the second factual dichotomy. Almost humorously, Osborne recounts that, if the Boy Scouts of America had spent more time acting openly homophobic, linking their “claimed anti-homosexual policy to one of [their] central purposes” or informed more than a small handful of individuals at national headquarters that such an “anti-homosexual policy” existed,\textsuperscript{49} the Court’s vote would have been more cohesive and the dissenting opinion would have been devoid of much of its ammunition.\textsuperscript{50} The Council has been less glib in purporting their anti-gay stance. After a court order was issued mandating GLIB’s inclusion, Mr. Hurley opted to cancel the parade in lieu of enabling the group to participate, stating “They’re not going to shove something down our face that’s not our traditional values.”\textsuperscript{51} In comparison, the Boy Scouts’ sporadic, meeker espousal of an anti-gay stance, in comparison to the Council’s constant avowal of discontent with homosexuality, furthered the perception that “the compelled inclusion of a homosexual scoutmaster”\textsuperscript{52} would not be deleterious to the Boy Scouts’ expressive speech rights. The Council’s fevered hatred of homosexuality is less intrusive on the individual level as its impact is dispersed among the constituents of GLIB. Mr. Dale’s increased psychological harm stems from the Boy Scout’s unwavering committal to his removal from the ranks of the association. By refusing to readmit

\textsuperscript{47}Jacoby, Arthur P. “Personal Influence and Primary Relationships: Their Effect on Associational Membership.” \textit{The Sociological Quarterly}. Winter 1966. Pg 22

\textsuperscript{48}Edgar, Christopher. “The Right to Freedom of Expressive”…Pg 207

\textsuperscript{49}Osborne, Michael “Erecting Prejudice”…Pg 523

\textsuperscript{50}Osborne, Michael “Erecting Prejudice”…Pg 544

\textsuperscript{51}The Bulletin. (March 11, 1994)

\textsuperscript{52}Osborne, Michael “Erecting Prejudice”…Pg 207-208
Mr. Dale in response to his post-expulsion suit and opting to pursue litigation, the Boy Scouts of America implied that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message” so antithetical to the Boy Scouts’ essential values that it would imperil the associative expression of the entire organization and its members.

The third factual dichotomy derives from the Hurley and Dale assertion that the Council and the Boy Scouts of America, respectively, are exempt from their state’s public accommodations law as private, noncommercial expressive organizations. Many legal scholars theorize that an organization is classifiable as an “expressive group” if it is “expressive” through engagement in a protected class of speech within the First Amendment, a group consisting of “people acting in concert”.

The scope of protection afforded to expressive associations under the First Amendment varies according to the “ability of the organization to play its social role.” The greatest degree of protection is afforded to intimate associations, comprised by relatively few people and highly selective in “decisions to begin and maintain” affiliation, while the least protection is afforded to commercially-oriented organizations. If an organization falls somewhere between public/commercial and intimate association, it is considered expressive by the Court; the State utilizes discretion in its determination of which expressive associations or expressive conduct necessitate regulation as places of public accommodation.

In Hurley, both the Council and GLIB are classifiable as expressive associations. Furthermore, both are geographically concentrated, non-commercial groups with restrictions to membership: GLIB is comprised of identifying as “openly gay, lesbian, and bisexual individuals…in the community” of Boston and the Council is an “unincorporated association

54 Edgar, Christopher. “The Right to Freedom of Expressive”…pg200
of individuals elected from various veterans groups.” Accordingly, each organization may attract a finite number of individuals, bounded by location and by a belief/identity; it is not likely that non-veterans would be members of the Council or non-LGBT identifiers or allies to be in GLIB. The organizations are “horizontally oriented” because a given individual member has the same theoretical ability to influence the association’s choice of expressive speech and message as does any other member. The same elements that restrict their memberships simultaneously restrict their ability to significantly influence the lives of non-members. As acknowledged by the Court, a parade, as a general entity, is a form of expressive speech that, “if large enough and a source of benefits (apart from its expression),” can behave as a place of public accommodation. St. Patrick’s Day-Evacuation Day Parade similarly provides a “public” service, but is not a place of public accommodation for two reasons: 1) the Council is such an explicitly expressive association, so its choice of Parade’s composition is expressive speech; and 2) the Council’s expressive message protrudes into the public sphere once per year, temporally truncating its capacity to exert a societal force significant enough to merit government regulation as a place of public accommodation.

In contrast, the Boy Scouts of America’s membership size, geographic distribution, cultural influence, commercial interests, tax exemptions, Congressional charter, lack of a political affiliation, nonsectarian religion, and inclusive membership policy muddle the demarcation between private/public and commercial/noncommercial expressive associations. The Boy Scouts’ presence in the public arena is almost constant, whether through volunteer services, utilizing public facilities, or through the vast number of the organization’s alumni inculcated with the organization’s specific moral agenda. Osbournesdjfns characterizes the Boy Scouts as “a vertically integrated national corporation

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59 Osborne, Michael “Erecting Prejudice”…Pg522
with tight control over its local and regional subsidiaries;”\textsuperscript{60} moreover, this elucidates that the actions of an individual have little influence on the trajectory or expressed message of the organization. Rather, the organization’s expressive message and its articulation method is determined by an elite cadre of members and imposed on its members. If a person’s share in the marketplace of ideas is determined by the number of people in the marketplace, and the discursive conduct in the marketplace manifests as a group’s expressive message, accordingly, a member of the Council will accrue a greater share in their group’s expression than will a Boy Scout. The Boy Scouts engage in a substantial amount of commercial activity, including the sale of products to the public and paid employment of copious people, and expressive activity to “be an example of a third category of quasi-expressive associations,”\textsuperscript{61} a reality which the Court failed to address in their decision.


_Hurley_, it has been shown, was an improper use of precedent for _Dale_, but the majority opinion in _Dale_ embodies pernicious jurisprudence for reasons independent of _Hurley_. This section aims to address those flaws. First, the majority critically erred by deferring to the Boy Scouts of America’s avowed conceptions of their expressive message as their *actual* expressive message. Second, the majority failed to concede that the Boy Scouts of America qualifies as a place of public accommodation. Third, the Court championed the rights of the private association to expression over the private individual’s liberty rights. The Court would have been better served in the usage of _Roberts v. United States Jaycees_ as precedent to avoid the aforementioned problems, the previous standard precedent for Freedom of Association for organizations significantly affecting the public sphere with large, nonexclusive membership policies that discriminate on the basis of an attribute unrelated to organizational expression. Whereas _Hurley_ directly affected the public sphere through the Parade’s presentation of

\textsuperscript{60} Osborne, Michael “Erecting Prejudice”…Pg522

performers to the spectatorship, Dale’s consequences are not geographically or temporally concentrated to legitimate the discriminatory policies of any private, noncommercial organization. Dale, like Roberts, implicates the future trajectory of society with its decision, extending overseas, while lacking the explicitly expressive type of actor as embodied by GLIB.

The majority opinion first evaluated the expressed values of the Boy Scouts. Following, it evaluated whether forced inclusion of Mr. Dale would impose an undue burden on the Boy Scouts’ expressive agenda. It found the Boy Scouts to profess an expressive agenda that prohibited the inclusion of homosexual individuals, and by “merely [engaging] in expressive activity that could be impaired,” Boy Scouts were protected as an expressive association from State intrusion. Furthermore, the Boy Scouts’ chosen method of expression is protected, and the Boy Scouts’ do not need a uniform view between its members on an issue for it to be a form of protected expression. Instead of utilizing an intermediate standard of review to weigh the competing interests, the Court opted to apply a “traditional First Amendment analysis” as employed in Hurley. The Court decried the decision of the Supreme Court of New Jersey as adjudicating based on disapproval of the Boy Scouts’ message instead of to uphold the First Amendment. Justice Stevens and Justice Souter each penned dissenting opinions to Chief Justice Rehnquist’s majority opinion. The decision has proven to be quite unpopular among legal scholars, with the American Bar Association filing an amicus brief on behalf of Mr. Dale.62

IIIb. Dale and the Boy Scouts’ “Expressed Values”

The Boy Scouts “large size, nonselectivity, inclusive rather than exclusive purpose,”63 discussed in part IIa, augments the breadth of the Court’s opinion in both geographic and socio-cultural terms through the quasi-assurance that a Boy Scout Troop will permeate almost any given neighborhood. Disregarding race, religion, socioeconomic status, and other cleaving factors, the requirements for admission are simply to live and abide by the “Scout’s Oath” and

the “Scout Law.” The “Scout Law” reads: “A Scout is: Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.”64 The “Scout’s Oath” mandates that, “to do my duty to God and country,” a Boy Scout must obey by the “Scout’s Law,” keeping themselves “physically strong, mentally awake, and morally straight.”65 The Scout Handbook includes the official Boy Scouts of America definition of the terms of the “Scout’s Law” alongside examples of such conduct, providing Scouts with an unambiguous manual to guide one’s choices in life. The Scoutmasters are required to embody both the values of the Law and Code, “both expressly and through example,” and are provided with a denser, more explicit version of the Scouts Handbook, The Scoutmasters Handbook, to help Scoutmasters properly instill a “system of values” in their underlings.66 Through scouting activities, like camping and hiking, guided by Scoutmasters, the Scouts are inculcated with the moral values necessary for good citizenship: “patriotism, courage, self-reliance, and kindred values.”67

Scouts are taught to accept the intrinsic differences between people; Scoutmasters are selectively chosen by the Boy Scouts because their adherence to organization’s values are steadfast, thus enabling them to effectively communicate the views of the organization onto the children. It was for this reason, combined with him exemplary scouting record, that Mr. Dale was selected to lead the Scouts of his troop into morality. Conversely, it was his adherence to the “morally straight” provision of the Scout Handbook, in combination with the morals previously entrenched within him by his Scoutmaster during his youth, that caused him to “do what his head and his heart [told] him [was] right”68 through gay rights advocacy. The Boy Scouts maintain that “morally straight” and “clean” are indicative of an anti-homosexuality message disseminated by the organization as their expressive speech; their expressive conduct involved the removal of Mr. Dale, a member they believed to be a personification of expressive

64 Boy Scouts of America, et al. v. Dale. 530 U.S. 649 (2000); Chief Justice Rehnquist for the majority
65 Boy Scouts of America, et al. v. Dale. 530 U.S. 649 (2000); Chief Justice Rehnquist for the majority
67 Boy Scouts of America, et al. v. Dale. 530 U.S. 666 (2000); Justice Stevens, dissenting opinion
68 Boy Scouts of America, et al. v. Dale. 530 U.S. 667 (2000); Justice Stevens, dissenting opinion
speech, to prevent the Boy Scouts of America from sending a message contrary to their beliefs implying the organization’s “accepts homosexual conduct as a legitimate form of behavior.”

Although the Boy Scouts’ attestation to an anti-homosexuality policy as plainly deduced from the Scout’s Oath and Scout’s Law is questionable, the Boy Scouts submitted a 1978 statement from their then-president to the executive committee of the organization, elucidating its moral stance that “homosexuality and professional or non-professional employment in Scouting are not appropriate,” to the Court to justify their decision to terminate Mr. Dale. The anti-homosexuality decree was not forwarded to lower levels of the vertical organization.

After their decision to expel Mr. Dale, the Boy Scouts professed that their associational rights to expression would have been burdened in the event that New Jersey’s Law against Discrimination (LAD) legally compelled them to absorb an “avowed homosexual” back into their group. In the Scoutmasters Handbook, it overtly states that Scoutmasters are not to “instruct Scouts… in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area,” in the handful of instances where sexuality is discussed in the Handbooks, the references serve to discourage teenage pregnancy, sex before marriage, and sexually transmitted diseases. Sexual conduct is addressed only within the discussion of what constitutes sexual abuse: the Youth Protection Program. Seemingly, the program was initiated by concerns raised by Boy Scouts of Am. v. Teal, a case involving a Scoutmaster, allegedly homosexual, that sexually abused his Scouts. In 1991, the Washington Times investigated the Boy Scouts, finding that over 350 men were banned for “sexual misconduct” between 1971 and 1986; a probable impetus for the 1978 statement illustrating Boy Scout’s aversion to “homosexual conduct.” For the same reason, further reinforced by exclusion based

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69 Boy Scouts of America, et al. v. Dale. 530 U.S. 641 (2000); Chief Justice Rehnquist for the majority
70 Boy Scouts of America, et al. v. Dale. 530 U.S. 640 (2000); Chief Justice Rehnquist for the majority
71 Boy Scouts of America, et al. v. Dale. 530 U.S. 669 (2000); Justice Stevens, dissenting opinion
on “homosexual conduct” in lieu of sexual orientation, it is likely that the Boy Scouts’ policy is partially derived from the fear that gay leaders will “convert” the youth to homosexuality or otherwise prey on their vulnerability.\textsuperscript{75} This reprehensible stereotype likely “justifies” the Boy Scouts’ revocation of adult membership for \textit{any} person involved in “advocacy of the morality of homosexuality to youth,”\textsuperscript{776} but the exclusion of homosexuals is warranted, as in Mr. Dale’s case, regardless of any indication of spreading a pro-gay agenda.

The Court determined the Boy Scouts’ explicit aversion to homosexual conduct publicly stated “by its assertions in prior litigation,”\textsuperscript{77} particularly in a case with similar facts from filed in the early 1980s, and in four policy statements written after Mr. Dale’s expulsion that were difficult to attain and of ambiguous authorship. \textsuperscript{78} In the first three policy statements, “homosexual conduct” is deemed to be inconsistent with the tenets of the Scout’s Oath and Law. In the last policy statement of the four, issued in 1993, the Boy Scouts abandoned their attempt to utilize the Scout’s Oath and Law to support an anti-homosexual agenda, instead decreeing that homosexuals are inconsistent with the expectations that “Scouting families have had for the organization” and cannot be appropriate leaders or role models within the organization.\textsuperscript{79} Without an investigation into the stimuli necessitating their discriminatory policies or an acknowledgement of the fact that the organization may have penned their policies in anticipation and submitted amicus briefs as a preemptive strike in the event of legislative action,\textsuperscript{80} the Court tacitly scorned the legitimate possibility that non-uniformity of views within the organization appears between actors at the highest level of organization. The Court stated that they needn’t examine the group’s written statements to extract or certify

\begin{itemize}
\item \textsuperscript{75} Clark, Stephen. “Judicially Straight?”…Pg 557
\item \textsuperscript{76} Boy Scouts of America, et al. v. Dale. 530 U.S. (2000); Chief Justice Rehnquist for the majority; Footnote 1
\item \textsuperscript{77} Boy Scouts of America, et al. v. Dale. 530 U.S. 652 (2000); Chief Justice Rehnquist for the majority
\item \textsuperscript{78} Boy Scouts of America, et al. v. Dale. 530 U.S. (2000); Justice Stevens, dissenting opinion; Footnote 5
\item \textsuperscript{79} Boy Scouts of America, et al. v. Dale. 530 U.S. 674(2000); Justice Stevens, dissenting opinion
\item \textsuperscript{80} Osborne, Michael “Erecting Prejudice”…Pg 519
\end{itemize}
expressive purpose, qualifying its (minimal) review of the association’s written assertions as an implication of sincerity in their message.81

However, the Court desecrated the integrity of the First Amendment in applying the Hurley-analysis to the case, ceasing their inquiry into the nature of the Boy Scouts’ “expression with respect to homosexuality” after deferring to the Boy Scouts’ assertion that “homosexual conduct” violates the Scout’s Law and Oath as evidence. Instead of evaluating the Boy Scouts’ expressive activities to determine whether an undue burden would be placed on the organization in the forced acceptance, the Court took the Boy Scouts’ avowal that Mr. Dale’s inclusion would be an onus as a statement of fact, preemptively rejecting the postulation that a sufficient state interest could be an impingement on expressive association. Ergo, Dale carved the framework, fashioning a two-step test to govern First Amendment protection for expressive associations: 1) arriving at a conclusion as to whether a group is an expressive association, then 2) deciding whether their expressive agenda’s advancement is hindered by the inclusion of that person.82

Andrew Koppelman laments that this decision vindicated the Boy Scouts’ for their discrimination, making them the “single largest entity in the United States that excludes gay people on the basis of their identity, and justifies this exclusion on the basis of gays’ own purported moral failings.”83 With their acceptance of an “official policy” to discriminate, the Court failed to note whether the policy was established: whether the amalgam of Government, Religious, or Educational entities providing the Scouts’ funding knew that they were, in effect, funding homophobia84. Adopting a policy is not akin to applying a policy; the latter indicates consent of the membership body. At 22 years old during Dale, only an argument of static associational values could legitimize the assumption that the 1978 statement’s views retained

81 Boy Scouts of America, et al. v. Dale. 530 U.S. 653 (2000); Chief Justice Rehnquist for the majority
84 Osborne, Michael “Erecting Prejudice”…Pg518
validity at the time of the case; thus, none of the presented documents can logically substantiate the veracity of a present-day message on homosexuality.

Carpenter contends that the “primary purpose of the members in coming together as an association can be determined by examining what they actually do when they associate,” an organization's "universe of viewpoints" by definition, and by proxy, its expressive speech is inherently intended to be the amalgamation of the 2.7 million plus Scouts and their parents. Associational freedom originated from the need to empower the individual through group speech in the ever-expanding marketplace of ideas; the Court’s top-down view of expressive conduct in associations delegates the rights of the masses to an elite cadre wholly removed from those it regulates. The Boy Scouts identify the “family,” or the unit level, as the rationale for its discriminatory policies, decreeing that homosexuals are inconsistent with the expectations that “Scouting families have had for the organization” and cannot be role models through leadership within the organization. Yet, as Mr. Dale eloquently stated, “People don't join the Boy Scouts because they're antigay. People join the Boy Scouts because they want acceptance, they want community.” Members of the Boy Scouts, as an ensemble, do not associate for purposes even tangential to promoting an anti-homosexual agenda, if at all; conversely, the choice for an individual to join an organization stems from philosophical like-mindedness and accrued benefit to membership.

To truly give “deference of an association’s view of what would impair its expression,” the Court should not have focused on the opinions of the cadre of elites fully removed from Dale, which promulgate an agenda based irrational fear and/or hatred of

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86 Carpenter, Dale. “Expressive Association and Anti-Discrimination Law after Dale.” Pg 1573
87 Ediar, Christopher. “The Right to Freedom of Expressive”…Pg 219
88 Boy Scouts of America, et al. v. Dale. 530 U.S. 666 (2000); Justice Stevens, dissenting opinion
89 Sunder, Madhavi. “Cultural Dissent.”…pg 545
90 Brief of the American Bar Association. Pg 9-10. “Boy Scout members associate in order to promote a certain set of moral values, of which the view that homosexuality is immoral is merely a small part”; “Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members.” Dale, 734 A.2d at 1223. But, as that court noted, encouraging “moral development” does not reflect a specific view on homosexuality, any more than it does on abortion, the use of contraceptives, divorce, euthanasia, or myriad other controversial moral issues on which BSA has no stated position.”
91 Boy Scouts of America, et al. v. Dale. 530 U.S. 653 (2000); Chief Justice Rehnquist for the majority
homosexuals, instead of attending to the organization’s definition of expressive message at the troop level. Mr. Dale’s troop is the only entity where the Boy Scout’s alleged “forced expression” could hypothetically transpire, so the community would allow for an estimation of the actual effect of a State-mandated alteration of an association’s expressive message. The local members of the community could recount their perceptions of Mr. Dale, gauging whether he is an adequately visible individual in both communities, gay and Scout, to necessarily fuse their meanings together and “compel” speech.

Justice Stevens, in the dissent opines, “Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation.”\footnote{Boy Scouts of America, et al. v. Dale. 530 U.S. 696 (2000); Justice Stevens, dissenting opinion} The Boy Scouts employ a charter system, wherein some of their local units are organized and operated by independent associations; the second largest charter by total youth membership is the United Methodist Church (UMC) with 371,499 Scouts\footnote{The Boy Scouts of America. “Charter Organizations.” \url{http://www.scouting.org/scoutsource/sitecore/content/Scouting/About/FactSheets/operating_orgs.aspx}}, approximately 14% of the entire Boy Scout membership. The UMC filed an amici curia brief, detailing their opposition to the Boy Scout’s professed message, to attest that the “actual views of BSA members” do not hold homosexuality and Scouting to be in conflict; moreover, they posited that the Boy Scouts’ discrimination conflicted with \textit{their} interpretation of the expressive message, which they perceive to promote the values of “trustworthiness, loyalty, and kindness.”\footnote{Brief of Amicus Curiae, General Board of Church and Society of the United Methodist Church, et al. at 3, Boy Scouts of Am. v. Dale, 550 U.S. 640 (2001) (No. 99-699)} With so many discrete entities “franchising” Boy Scouts’ troops, the views in the Boy Scouts’ “Official Position” cannot be construed as the organization’s actual expressive agenda tenants or as the majority sentiment.
The consequence of the Court’s deference to leaders is the reinforcement of the ideologies of the “powerful within cultural associations.”

The Court is correct in holding that an “association need not associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” In applying that mantra to the Boy Scouts, the Court made a critical error by protecting a discriminatory membership policy wholly unrelated to achieving their articulated membership goals or fulfilling their associational agenda. An organization propounding an inclusive membership policy, discouraging the discussion of sexual orientation, religiously “non-sectarian,” and politically neutral with a primary objective is to build morals and install a moral code in male youth through non-sexual activities such as camping does not have a logical reason to practice discrimination on the basis of sexual orientation. Such a discrimination would alienate potential members, religious organizations, political affiliations, and, obviously, LGBT individuals and allies. The Court is accurate in the observation that an expressive association has the right to choose its method of expression; however, the Boy Scouts, for copious reasons, are not purely an expressive association and cannot be properly assessed as such.

Mr. Dale still possessed the same qualities as a human being that elicited his effective leadership in the Boy Scouts from age 8 until his dismissal; based on his previous action, there was indication that he mingled his sexual orientation with his role as Scoutmaster. He began the preponderance of his publicly expressive activities as a result of the discrimination he experienced directly because of the Boy Scouts’ discriminatory policy. “The majority did not

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95 Sunder, Madhavi. “Cultural Dissent.”...pg 553
96 Boy Scouts of America, et al. v. Dale. 530 U.S. 653 (2000); Chief Justice Rehnquist for the majority
97 The Boy Scouts participate in commercial enterprises, such as selling uniforms and memorabilia, which provide it less associational protection under the First Amendment as per Roberts v. United States Jaycees. If exclusion of an individual from an organization could result in economic ramifications, like the inability to gain certain social networking advantages or tactical skill building, then the organization does not enjoy the same rights as would an intimate expressive organization orientated toward and deriving benefits purely from other members. In Roberts v. United States Jaycees, an exact definition of intimate expressive associations is not given but is implied to be related to intimate bonds such as marriage.
find (and could not have found) as a matter of binding fact at that stage of the litigation that
the Boy Scouts *expressly* inculcated a particular moral view of gay sexuality,"§98 and there is no
indication that Mr. Dale would have been required to transmit any message on
heterosexuality. If the Boy Scouts *expressly* communicated an anti-homosexual agenda to
anyone outside the organization’s cadre, then their words could be adjudicated at face value.
In the absence of such a conduct, this paper posits that the Boy Scouts refused to make a
concerted effort to inform the organization’s mass of their views because they feared that their
policy would result in a significant decline in the number of received government contracts,
increasing the costs of sustaining to the organization.99

**Part IIIc. The State’s Interest**

“It is a statistical certainty that tens of thousands of the boys in the Scouts will grow up
to be gay,” remarks Koppelman,100 and the State has a vested interest in certifying that, first,
the mental health of these children is not eroded by the spread of a cancerous majority opinion
implying the inferiority of gays, as a plausible result of mass diffusion of views like those
articulated by in the Boy Scouts’ policy. Secondly, the State has an interest in limiting the
arbitrary exclusion of gay youth from institutions that could endow them with community
building skills, participation with peers, access to a large and influential network of former
members, encourage a “lifetime of engaged citizenship,”101 as purportedly attainable through
membership in the Boy Scouts. The lack of an “immediate” conference of commercial
advantage to struggling children, regardless of sexuality102, does not preclude the deprivation
to which they are subjected.103

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§98 Clark, Stephen. “Judicially Straight?”...Pg591
§99 Edgar, Christopher. “The Right to Freedom of Expressive”...Pg 229: “A governmental act "deters" a person from engaging in
an activity when, as a result of that action, the person engages in the activity less often than he did before. However, the mere
fact that the government makes taking a certain action more costly for a private party-thus requiring that party to expend
more time, resources, and effort than it otherwise would have expended-does not necessarily mean that the government's
action will cause the private party to engage in the activity in question less often".
100 Koppelman, Andrew. “Are the Boy Scouts Being as Bad as Racists?” Public Affairs Quarterly. October 2004. Pg 375
101 Brief of the American Bar Association. Pg 15
102 Deprivation as a result of social stigma for gay children, lack of an interactive forum between gay youth and straight youth
to exacerbate oppression, and the lack of access to gay role models to ease the confusion imbedded in individual sexual
In *Dale*, the Court quotes an earlier decision, *Robert v. Jaycees*, to elucidate the tension inherent between the State’s “compelling interest” and a person’s “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”\(^1\)\(^0\)\(^4\) In the interest of democracy, the right to expressive association “[preserves] political and cultural diversity” while simultaneously “shielding dissident expression from the majority.”\(^1\)\(^0\)\(^5\) The government’s ability to operate for the “public good” is generated by contestation in the “public voice”;\(^1\)\(^0\)\(^6\) however, when minority opinion is quashed by the “public voice,” the government, in the interest of its own efficacy, must act to reestablish minority opinion. Thus “large or otherwise important” expressive associations are “important centers of norm-formation,”\(^1\)\(^0\)\(^7\) a qualification undoubtedly met by the Boy Scouts.

“Antidiscrimination laws, like other regulations of conduct, mediate conflicts between people who do not live in isolation from one another and whose conduct may injure each other;”\(^1\)\(^0\)\(^8\) they protect the ability to dissent to shield the unequivocal promotion of “an approved message or [discouragement] of a disfavored one,”\(^1\)\(^0\)\(^9\) monitoring conduct that could destabilize the marketplace of ideas through impermissible silencing of a group without majority power. Historically, the First Amendment has protected the rights of people with a minority sexual orientation, providing avenues for them to escape legislation inspired by the heteronormative conception of the “good life”\(^1\)\(^1\)\(^0\) and to associate with like-minded people,
bolstering group strength through a numerical increase that, in turn, correlates with an increase in group socio-political power. By affixing its associational mission to the indoctrination of a set of morals in its youth membership, the Boy Scouts are properly deemed an expressive association; moreover, it is because of this expression, coupled with their high visibility and utilization of governmental and private finance and property to achieve these goals that simultaneously causes the Boy Scouts to function as a place of public accommodation.

For organizations intertwined with the public sphere, exit is not a feasible method to indicate dissent if the organization provides a “public good.”\footnote{Koppelman, Andrew. “Are the Boy Scouts Being as Bad as Racists?” \textit{Public Affairs Quarterly}. October 2004. Pg 377} The Boy Scouts have, over more than a century, honed their power to coerce public opinion and culture through their visibility and myriad of alumni. If the Boy Scouts are accorded the exclusive ability to proselytize their moral code to half of all six-to-ten year olds, all of whom are in the midst of their ideological formations, then the State has an inherent interest in restricting their expression. The Court’s task in \textit{Dale} was to evaluate the State’s interest against the professed organizational interests; conversely, in the dereliction of this duty, the Court hypocritically “failed to apply its usual deference to a facially neutral law that had the effect of protecting the rights of gay men and lesbians,”\footnote{Siedman,Louis Michael. “The Dale Problem”…Pg 1560} and solidified the ability of majority views to flood the marketplace of ideas. Even if the Boy Scouts are “silent” within the organization’s educational duties on sexuality, their silence neglects addressing the unique needs of sexually confused children while rejecting the notion that alternative sexual orientations are normal and not to be chastised.

In \textit{Brown v. Board of Education} (1954), the Court regarded educational facilities as “the very foundation of good citizenship,” citing that such facilities play a unique and important role in society through norm formation that forces “discrimination in education to
be especially pernicious.” Although Brown deals with public education, the Boy Scouts’ admission policies are inclusive, the organization is permitted to use public schools as recruiting grounds; and their expressive activity teaches youth useful life skills; hence, it would not be ludicrous to conjecture that they could be regulated with a modicum of the magnitude with which State public schools are monitored. The State has an interest in regulating the Boy Scouts as an educational institution; therefore, their assertion of a discriminatory belief cannot validate their right to discriminate because their impact is not confined to their organization’s members. Lim argues, in contrast, that the State “does not rely on the Boy Scouts to prepare the young for citizenship” as they do public educational facilities; however, the Boy Scouts were chartered by the Government and enjoy special relationships with the Government because the Boy Scouts function as, at a minimum, a resource to further the citizenship-related mission of schools. Exclusion from a scouting trip does not directly affect “the equitable distribution of goods and services in a society” to automatically sanction discretionary State action, but the State interest is palpable and important; the Court’s decision to ignore the possibility of State interest permeating free association without triggering a First Amendment violation gravely underestimates the roles of social organizations in the creation of cultural fabric.

Koppelman ponders “not whether the leadership is pure in heart, but whether it is using its enormous cultural power in a way that reinforces a pollution-based prejudice,” concluding that the Boy Scouts’ cadre of executives manipulate the organization to trumpet their specific views of intrinsic inferiority of gay persons; they terminated Mr. Dale’s employment without knowing if he actually engaged in “homosexual conduct,” chose not to allow the individual charter organizations to profess a moral view on homosexuality according

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114 Lim, Karen. “Freedom to Exclude”…Pg 2639
to their beliefs, and removed the question to be determined at the community level. Their policies directly infect children, the subset of the population most likely to be victimized and to victimize others because of sexual orientation, to potentially harm their own members. In response to the Rhode Island Medical Society’s resolution, which stated that teen suicide would rise as a result of the Boy Scouts’ ban on gays, the Boy Scouts replied, with cold callousness, that there were “other organizations that these kids can be members of.”

With that retort, the Boy Scouts diminish the power they assert outside of their membership and the efficacy of their expressive message. If they were truly instilling values in their members as a norm-creating institution, their denial of partial responsibility implies either that they possess an insular community of Scouts completely separated from the rest of society, or that the values they propound are only applicable within the confines of their communal actions.

The Court majority opinion endorses “cultural survival” associational law – where the culture is a living entity with rights, its culture “static, homogeneous, bounded, and distinct;” this logical conclusion presupposes their assumption that merely the status of being gay is enough to force a message about the organization at large. With their primary expressive message, the installation of values in children, and their silence with regard to sexuality, the compelled inclusion of Mr. Dale would have little to no actual effect on the ability of the Boy Scouts to engage in expressive activity. The allowance for Mr. Dale’s exclusion is the Court’s artificial life support of a fading but still majoritarian conception of traditional sexual relations, continuing the traditional sexual mores. The “fervently antigay attitudes” of three of the Justices presiding over the case, Justice Thomas, Justice Scalia, and

117 Koppelman, Andrew. “Are the Boy Scouts Being as Bad as Racists?” Pg 376
118 Sunder, Madhavi. “Cultural Dissent.” Pg 508
120 517 U.S. 620, 644, (1996); In Justice Scalia’s dissenting opinion in Roper v. Evans, likened the animus toward homosexuals as equivalent to the animus against murder, averring the “eminent reasonableness” of a law sanctioning discrimination on the basis of sexual orientation.
Chief Justice Rehnquist, influenced their assessment of a conceivable State justification for such a law against discrimination, finding reasonableness and rationality in the Boy Scouts’ intention to remove gays as a consequence of their moral inferiority. In fact, in previous opinions about expressive associations but unrelated to sexual orientation, Scalia’s opinions have consistently propounded a distinction between the level of First Amendment protection “between actual speech and expressive conduct.” Perhaps Justice Stevens recognized that personal prejudices may have been at the heart of the Court’s majority opinion when he remarked that “The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone - unlike any other individual's - should be singled out for special First Amendment treatment.” The Court majority gives the association sovereignty over discursive rights, to the chagrin of its membership; they neglect any intra-organizational dissent, instead ascribing a uniform ideology on a group’s public façade, successfully continuing the cycle and perpetuation of the marginalization of already marginalized groups. Thus, the dissenters within the organization unwittingly contribute to the stabilization of caustic stereotypes because of their membership in a large, dictatorial association that tenders enough benefit that the option of exit is impractical.

Carpenter argues that, for the Boy Scouts, silence is their actual expressive speech, avoiding a discussion of the morality of sexual conduct, specifically homosexual conduct, by insulating it from customary spheres of discussion. Resultantly, the “mere presence” of Mr. Dale does not force an expressive message but, rather, generates a discussion that could

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121 Kavey, Michael. “Private Voucher Schools and the First Amendment Right to Discriminate.” Pg773 : “Frustrated advocates for gay and lesbian rights sometimes refer to the "gay exception," by which they mean the tendency of courts to twist otherwise unambiguous legal principles in order to exclude gays and lesbians.”

122 Clark, Stephen. “Judicially Straight?” Pg 593

123 Boy Scouts of America, et al. v. Dale. 530 U.S. 696 (2000); Justice Stevens, dissenting opinion

124 Obviously, Mr. Dale did not approve of his dismissal from the Boy Scouts of America and was greatly disheartened that his sexual orientation was the only explanation proffered. Still, he desired to continue his relationship with the organization despite their destructive and acerbic characterization of a facet of his being. His sentimental bond with the organization overpowered his rational recognition that the Boy Scouts were led by executives that genuinely believed people of his sexual orientation “less.”

125 Carpenter, Dale. “Expressive Association and Anti-Discrimination Law after Dale…” Pg 43

polarize the group. What minre?85 omits is that Dale itself created that discussion both within the organization and around the organization. The Boy Scouts had to address the topic, albeit in exceedingly vague terms, in order to proceed with the litigation process, even if the Court shielded the Boy Scouts from defending their homophobic views on the national stage; thus, the prospective damage caused by Mr. Dale’s presence was self-inflicted by the organization. Forced to “come out” as an organization against gay males, their sponsors and communities began to critically reexamine relationships with the organization. Unlike GLIB in Hurley, Mr. Dale did not join the organization for the express purpose of forwarding a contrarian opinion;127 adding to the erosion of the sincerity of the Boy Scouts’ “compelled expression” claim. He is not “an essential concomitant of effective speech;”128 if he were, then the organization implies either that gay individuals are compulsive (unable to perform tasks without flouting their sexual orientation), inferior (inherently unqualified because of their sexual orientation), or deviant (if sexual orientation is a choice, they choose to be incompatible with the majority of society). Were deterring homosexuality a true mission of the organization, and Mr. Dale an exemplar of Scout values before his expulsion, then it would follow that the organization failed to express their anti-gay agenda sufficiently enough to instill it in their most prototypical members.

IIIc. The Privatization of Speech Rights

The main effect of the Boy Scouts in their expulsion of Mr. Dale was to artificially tamper with the marketplace of ideas within the organization, quelling dissenting opinions, maintaining cultural stasis, and eliminating Mr. Dale’s free speech rights as an entity independent of the organization. An individual has the First Amendment right to express speech, but the Dale majority protects associational free speech “as private space through

127 The Hurley Court stated that, even in a parade functioning as a place of public accommodation, GLIB could not be mandated inclusion because of its explicit expressive purpose.
128 Clark, Stephen. “Judicially Straight?”...Pg592
property-like entitlements including the rights of absolute use, exclusivity, and transfer;”\textsuperscript{129} similar to the “monopoly in the marketplace of ideas” theory expressed earlier in regard to \textit{Hurley}.

The executive decisions of the Boy Scouts apportion an individual member’s expressive rights in the public and private spheres; “individuals have no right to liberty \textit{and} equality \textsl{within} a normative association…or to hold plural views.”\textsuperscript{130} \textit{Dale} conferred a chilling effect on the Boy Scouts’ membership: the Boy Scouts are sanctioned to remove members expressing dissenting or otherwise contrarian views about the organization in the public sphere, and this threat of removal enforces the members’ silence. Whether concerning atheists\textsuperscript{131} or gays, the Boy Scouts’ executives dictate the trajectory of debates in both the external and internal spheres, asphyxiating the free flow of ideas which the First Amendment promised to protect.

Recognizing the right of the individual to expressively associate with the organization is analogous to recognizing the right of the individual to their own personal identity. The Court acknowledges but ultimately rejects the right of the individual to their identity: “that is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member group would impair its message,”\textsuperscript{132} but if Mr. Dale’s one interview in a local paper compelled expression, likely the discretionary boundaries are endless.

\textit{Dale} can be reduced to two primary conflicts: that between an organization’s leadership and its members, and that between an individual member’s expressive activity in public and expression within the association. If an individual leases an apartment and chooses to fly a desecrated American flag outside their window, the property owner cannot unearth some unenforced, decades-old document to justify issuing an eviction notice; furthermore, the

\textsuperscript{129} Sunder, Madhavi. “Authorship and Autonomy” … Pg.147
\textsuperscript{130} Sunder, Madhavi. “Cultural Dissent.”…pg 535
\textsuperscript{131} The Boy Scouts of America also excludes atheists from their membership on the basis that they cannot adhere to the “duty to God” portion of Scout’s Law. Koppelman, Andrew. “Are the Boy Scouts Being as Bad as Racists?” \textit{Public Affairs Quarterly}. October 2004. P383
\textsuperscript{132} Boy Scouts of America, et al. v. Dale. 530 U.S. 653 (2000); Chief Justice Rehnquist for the majority
flag is logically attributed to the individual leaser, not to the apartment building owner. But, with Mr. Dale, this situation is exaggerated: an immutable and omnipresent partition of his identity cannot be resected at will, so even if he did not fly the flag, the fact that the apartment complex owner knew it existed somewhere in the apartment would have been the impetus for eviction. The Court’s decision inverts this property arrangement, re-appropriating Mr. Dale’s exclusive property, his sexual orientation, as property within the dominion of the organization’s rights. Mr. Dale transmitted part of his expression to the Boy Scouts as a condition of his membership, trading individual liberty for temporary association; the Boy Scouts received this property and provided Mr. Dale with affiliation, so they do not “have the right to interfere with Dale's entitlement to affiliation with BSA.” The autonomy granted to the Boy Scouts by the majority stands against the purpose of expressive associations; and Mr. Dale’s expression, not that of the Boy Scouts, are suppressed.

Theoretically, the Boy Scouts do not “discourage or forbid outside expressive activity,” but the Boy Scouts’ treatment of Mr. Dale, alongside the Court’s decision, indicate that a certain engagement outside the organization could be threatening enough as to alter their expression. This reliance on possibility, not action or regard for past conduct, is an infringement on the liberties of the membership. If one can actively advocate for a political party outside the Boy Scouts’ confines, it does not follow that advocating for a particular political view – gay rights – could be isolated as impermissible. The Boy Scouts instruct their Scouts in their set of morals, but punish then for adhering to their values. Their ascription of intertwineent between their associative expression and Mr. Dale’s sexual orientation in the

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133 Siedman, Louis Michael. “The Dale Problem”...Pg 1552
134 Sunder, Madhavi. “Cultural Dissent.”...pg 554
135 Boy Scouts of America, et al. v. Dale. 530 U.S. 696 (2000); Justice Stevens, dissenting opinion
136 “A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.” To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.” Thus, the removal of dissenting opinions is inherently antithetical to the core values expressed by the Boy Scouts. Allowing for dissent is necessary for preparing good citizens able to defend their opinions and spread the Boy Scouts’ code of ethics to others in the public sphere.
public sphere bolsters the perception that the Boy Scouts’ influence extends far beyond its membership. They imply that Scouting is imbedded in an individual so deeply as to be constantly expressed outside the organization; even when Mr. Dale is in the context of a gay rights group, he is continually expressing his identity as a member of the Boy Scouts of America. Thus, action performed outside the organization by Mr. Dale or other members is ascribable to the organization itself. Conversely, if this were the case, then Mr. Dale’s expulsion does not terminate his Boy Scout-iness; hence, his expulsion would be a moot point. Unless the Boy Scouts committed to a witch hunt – rooting out all the individuals that could be construed or potentially to violate the provisions of being “morally straight” or clean” in the public sphere – to ensure the maintenance of its expressive speech, a daunting task with such a large membership, their complaints about compelled speech are unsubstantiated.

IV. The Repercussions for Discrimination

In Hurley and Dale, the Court ascribes proprietary speech rights to expressive associations that simultaneously sanction the right to discriminate. Although the view of this paper is that neither were exemplary of sound law, the more egregious infringement on the rights of gay individuals occurred whence the Court usurped the State’s interest in preventing a powerful socializing agent as widespread and prolific as the Boy Scouts of America from invidiously discriminating on the basis of sexual orientation. Moreover, whereas the issue of the Parade’s discriminatory composition by the Council has been marginally ameliorated, the Boy Scouts of America continue their destructive agenda unperturbed. The “traditional” Parade is now succeeded by the “St. Patrick’s Peace Parade,” marching one mile behind and including a growing number of participants each year.137 The Council still annually receives the city of Boston permit to organize the “traditional” Parade, but after their continued refusal to allow

gay rights groups to march, Boston permitted a group called “Veterans for Peace” to organize their own parade to exercise their expressive association rights.

The Boy Scouts have also been unwavering in their commitment to discrimination. *Dale*, though, thrust the organization out of the homophobia closet by requiring them to enunciate their views openly to the public and to a majority of their members. As a result, creative organizations and governments have managed to either limit or eliminate funding and special privileges previously granted to the Boy Scouts. In response, the Boy Scouts accused these governments of impermissible targeting and have initiated litigation against myriad municipalities denying them access to facilities or funding.\(^\text{138}\)

In the court of public opinion, the Boy Scouts are losing favorability. An organization once renowned for camping, hiking, skill-building and community service initiatives is now blighted with their self-induced stain of prejudice. The Court’s solidification the Boy Scout’s executive cadre’s organizational hegemony over the mass of the organization, especially in light of their involvement in the wide-scale inculcation of social norms, may have diminished their ability to approximate a place of public accommodation. Given the size and distribution of the organization, it is dubious that their cultural influence will significantly degrade in the near future; but in the long run, as mainstream support for gay equality continues to surge, the Boy Scouts will be faced with the Darwinian choice to either descend from relevancy or adapt to changing cultural norms. If the marketplace of ideas retains a modicum of efficacy, they will

\(^{138}\) The State of Connecticut excluded the Boy Scouts from a state-sponsored program involving the distribution of charitable funds because they claimed that the Boy Scouts’ membership policy violated the State’s anti-discrimination laws. The Boy Scouts challenged this exclusion with litigation in *Boy Scouts of America v. Wyman*. In *Boy Scouts of America v. Till*, the Boy Scouts sued the Broward County School Board for barring the Boy Scouts from accessing its facilities, again citing its policy against providing services for discriminatory organizations. A lease of a State park to the Boy Scouts by the City of San Diego was held to constitute a violation of the *Lemon* test because the Boy Scouts were perceived to utilize their anti-discrimination policy to further religious goals. There have been congressional attempts to revoke the Boy Scouts’ charter. Many companies, like Chase Manhattan Bank and Levi Strauss, alongside charitable organizations like United Way, have withdrawn funding after *Dale*. Fort Lauderdale, Florida’s city commission denied the annual $10,000 payment to the Boy Scouts as a consequence of the Scouts’ violation of the city’s anti-discrimination policy. Anne Arundel County, Maryland eliminated the Boy Scouts’ access to their public schools. The Boy Scouts no longer enjoy free use of the City of Chicago’s facilities.
elect to adapt, eventually remedying the societal wrong emanating from the majority’s opinion in *Dale*. 