

THE BOY SCOUTS, FREEDOM OF ASSOCIATION, AND THE RIGHT TO DISCRIMINATE: A LEGAL, PHILOSOPHICAL, AND ECONOMIC ANALYSIS¹

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ABSTRACT

In *Dale v. Boy Scouts of America*,² the New Jersey Supreme Court decided that the Boy Scouts could not exclude Mr. Dale from serving as an adult leader because he was gay. However, the U.S. Supreme Court in *Boy Scouts of America v. Dale*³ concluded in a 5-4 decision that the Boy Scouts' First Amendment grounded freedom of association allowed them to exclude Dale. We use the facts of the case and the decisions of both courts to examine the conflict between freedom of association and New Jersey's contention that a compelling interest in weeding out discrimination gives it a license to intrude into private conduct between individuals. We discuss the First Amendment questions of intimate association, expressive association, and freedom of speech. We question

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2. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).

3. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

whether the perceived good or bad moral character of individuals should ever be a deciding factor in freedom of association cases.

For example, could government compel one to associate with Mother Theresa just because she is a moral person? What if we prefer associating with friends who smoke cigarettes, eat fatty steaks, drink beer, gamble, and watch pornographic movies? As long as we do violence to no other person, what business is it of the government? We question whether the heavy hand of government should ever regulate freedom of association. We briefly allude to James Madison's thoughts on compelling people to advocate ideas with which they disagree. We conclude with a discussion of the philosophical and economic effects of discrimination laws and with a radical proposal concerning the natural right of free association.

I. INTRODUCTION

In *Boy Scouts of America v. Dale*,⁴ the Supreme Court was faced with one of the most contentious questions facing today's society. That is whether an organization like the Boy Scouts can either determine with whom it associates, or, whether there is some overriding public interest in compelling associational acceptance of, as in this case, an avowed homosexual. Are the Boy Scouts to be regarded by some as heroic defenders of James Madison's treasured idea of freedom of association? Or are they to be seen, as they are in many quarters, as evil discriminators against individuals who have a privacy right to their sexual orientation? This controversy commenced when the complainant James Dale became a scout in 1978 at the age of eight.⁵ He remained one until he turned eighteen.⁶ Dale was an exceptional scout and achieved its highest honor, the rank of Eagle Scout.⁷ About the time he left home to attend Rutgers University, the Boy Scouts approved his application for the adult position of assistant scout master in Troop Seventy-Three.⁸ When Dale arrived at Rutgers University, he acknowledged that he was gay and eventually became the co-president of the Rutgers Lesbian/Gay Alliance.⁹ Later, Dale was interviewed by a newspaper reporter writing about the psychological and health needs of

4. *Id.*

5. *Id.* at 644.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 645.

lesbian and gay teenagers.¹⁰ “[T]he newspaper published the interview and Dale’s photograph over a caption identifying him as the co-president of the Lesbian/Gay Alliance.”¹¹

Not surprisingly, Dale then received a letter from the Monmouth counsel executive revoking his adult membership.¹² In response to Dale’s inquiry about his revocation, the executive responded by letter indicating that the Boy Scouts “specifically forbid membership to homosexuals.”¹³

Thereafter, Dale responded by filing a complaint against the Boy Scouts in New Jersey Superior Court.¹⁴ He alleged that the Boy Scouts had violated New Jersey’s public accommodations statute and its common law by revoking his membership based solely on his sexual orientation.¹⁵ “New Jersey’s public accommodations statute prohibits, among [many] things, discrimination on the basis of sexual orientation in places of public accommodation.”¹⁶ Some of the places listed in the

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (citations omitted).

14. *Id.*

15. *Id.*

16. *Id.* see N.J. STAT. ANN. §10:5-5 (West Supp. 2004), stating:

“A place of public accommodation” shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any

statute do not appear to be physical “places” in the traditional meaning of the word.

Nevertheless “[t]he New Jersey Superior Court’s Chancery Division granted summary judgment in favor of the Boy Scouts.”¹⁷ The superior court decided that the Boy Scouts was not a place of public accommodation but rather was a distinct private group exempt from coverage under New Jersey’s accommodation law.¹⁸ The court also decided that the Boy Scouts’ beliefs about homosexuality were unmistakable and that the First Amendment freedom of “expressive association”¹⁹ prevented the state from compelling the organization to associate with Mr. Dale as an adult leader.²⁰

On appeal, the New Jersey Superior Court’s Appellate Division reversed and remanded Dale’s claim holding that the state’s public accommodations law applied to the Boy Scouts.²¹ Thus, the court rejected the Boy Scouts’ federal constitutional claim of freedom of association.²²

The Boy Scouts appealed to the New Jersey Supreme Court.²³ The Scouts argued that the application of New Jersey’s public accommodations law violated their constitutional rights “to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose of engaging in protected speech.”²⁴ However, the New Jersey Supreme Court concluded that the Boy Scouts’ “large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not ‘sufficiently personal or private to warrant

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

17. *Boy Scouts of Am.*, 530 U.S. at 645.

18. *Id.*

19. *Id.* at 648.

20. *Id.* at 645-46.

21. *Id.* at 646.

22. *Id.*

23. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1219 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000).

24. *See id.* (quoting *Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987)).

constitutional protection' under the freedom of intimate association."²⁵ In regard to the Boy Scouts' claimed right of expressive association, the New Jersey Supreme Court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members."²⁶ However, the court noted that it was "not persuaded . . . that a 'shared goal[]' of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral."²⁷ Therefore, the court held that "Dale's membership does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way' [Boy Scouts] existing members' ability to carry out their various purposes."²⁸ The New Jersey court also determined that the State had a compelling interest in eliminating "the destructive consequences of discrimination from our society,"²⁹ and that the State's public accommodations law does no more than necessary to accomplish its purpose of stamping out such "destructive discrimination."³⁰

The Boy Scouts relied on *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*³¹ to support its First Amendment right to exclude Dale from the organization.³² The New Jersey Supreme Court decided that *Hurley* was not definitive. In the court's view, *Hurley* was distinguishable because "the reinstatement of Dale [did] not compel [the] Boy Scouts to express any message."³³

25. *Id.* at 1221.

26. *Id.*

27. *Id.* 1223-24 (alteration in original) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984)).

28. *Id.* at 1225 (alteration in original) (citations omitted).

29. *Id.* at 1227.

30. *Id.*

31. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995). Here, as we will explore in greater detail later, the Supreme Court held that a gay group did not have a First Amendment right to march in a St. Patrick's Day parade. The Court decided that inclusion of the gay group would interfere with the parade organization's First Amendment rights by giving the impression that they sponsored the views of the gay group. *See id.* at 572-73. The Court determined that the parade is an inherently expressive undertaking. *Id.* at 573-78.

32. *Dale*, 734 A.2d at 1228.

33. *Id.* at 1229.

II. THE MAJORITY

In *Boy Scouts of America v. Dale*,³⁴ Chief Justice Rehnquist commenced his analysis of the issue by citing *Roberts v. United States Jaycees*³⁵ for the proposition that “implicit in the right to engage in activities protected by the First Amendment [i]s a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”³⁶ He pointed out that government actions may constitutionally burden this freedom in many ways.³⁷ A prime example includes “intrusion into the internal structure or affairs of an association”³⁸ like imposing a “regulation that forces the group to accept members it does not desire.”³⁹ Obviously, forcing a group to accept members it does not desire may impair the ability of the group to express the views that it wants to articulate. Relying on *Roberts*, Rehnquist explained, “freedom . . . plainly presupposes a freedom not to associate.”⁴⁰ Consequently, he said “[t]hat the forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association”⁴¹ when his presence has an effect on the group’s ability to advocate their views.⁴²

The freedom of expressive association, however, is not always absolute.⁴³ For instance, the Supreme Court ruled that this freedom may be impacted “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁴⁴ The Chief Justice then turned to a determination of whether or not the Boy

34. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

35. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The Jaycees brought an action contending that Minnesota’s public accommodations law requiring them to admit women violated the male members’ intimate association rights. The Supreme Court concluded that “Jaycees chapters lack[ed] the distinctive characteristics that might afford constitutional protection to the decision . . . to exclude women.” *Id.* at 621. The Court emphasized that the local chapters “are neither small nor selective[,]” and that “much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship.” *Id.*

36. *Id.* at 622.

37. *Boy Scouts of Am.*, 530 U.S. at 648.

38. *Id.* (quoting *Roberts*, 468 U.S. at 623).

39. *Roberts*, 468 U.S. at 623.

40. *Boy Scouts of Am.*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

41. *Id.*; see also *N. Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988).

42. *Boy Scouts of Am.*, 530 U.S. at 648.

43. *Roberts*, 468 U.S. at 623.

44. *Id.*

Scouts are entitled to protection because they engage in “expressive association.”⁴⁵ His inquiry led to an examination of the Boy Scouts’ mission statement. The gist of this document is essentially that the Boy Scouts seek to instill values in young people that will lead them to make ethical choices in their life experiences.⁴⁶

Relying on the Boy Scouts’ mission statement, the Chief Justice noted that it seems indisputable that the Boy Scouts were seeking to transmit a system of values by engaging in expressive activity.⁴⁷

Having decided that the Boy Scouts’ stated mission denotes expressive activity, the next inquiry was “whether the forced inclusion of Dale as an assistant scout master would significantly affect [their] ability to advocate public or private viewpoints.”⁴⁸ This inquiry required the Court to briefly examine the Boy Scouts’ views on homosexuality.⁴⁹ A careful reading of the mission statement clearly reveals that the Boy Scouts do not expressly mention sexual orientation in their Scout Oath or Scout Law.⁵⁰ However, according to the Boy Scouts, homosexual conduct is inconsistent with the important life values found in the Scout Oath and Scout Law.⁵¹ Accordingly, the values that the Scouts claim to

45. *Boy Scouts of Am.*, 530 U.S. at 648.

46. “It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.” *Id.* at 649. These values are based on both the Scout Oath and the Scout Law which state:

Scout Oath:

On my honor I will do my best [t]o do my duty to God and my country and to obey the Scout Law; [t]o help other people at all times; [t]o keep myself physically strong, mentally awake, and morally straight.

Scout Law:

A Scout is: [t]rustworthy [o]bedient [l]oyal [c]heerful [h]elpful [t]hrifty [f]riendly [b]rave [c]ourteous [c]lean [k]ind [and] [r]everent.

Id. at 649.

47. *Id.* at 650 (citing *Roberts*, 468 U.S. at 636 (O’Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement”)).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

instill in their members are based on the same Oath and Law.⁵² So from where do these values arise? In the view of the organization, the values it seeks to instill are represented by the terms “morally straight” and “clean.”⁵³ Hence, such terms are incompatible with homosexuality.⁵⁴

Certainly, reasonable people can derive different meanings of the terms “morally straight” and “clean.”⁵⁵ Many people might believe that homosexual conduct falls within these parameters. Further, others may maintain that sexual orientation is no one else’s business. Still others, apparently including the Boy Scouts, believe that homosexuality is incompatible with living a morally straight and clean life.⁵⁶

The Supreme Court observed the New Jersey Supreme Court’s conclusion that “exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts’ commitment to a diverse and ‘representative’ membership. . . [and] contradicts Boy Scouts’ overarching objective to reach ‘all eligible youth.’”⁵⁷ The New Jersey court concluded that the Boy Scouts violated the States’ discrimination law, in part, because the exclusion of homosexual members “appears antithetical to the organization’s goals and philosophy.”⁵⁸

Chief Justice Rehnquist would have none of this. His ringing response was to reject the entire notion that a court could rebuff a private organization’s philosophy.⁵⁹ He said that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”⁶⁰ Further, “[a]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.”⁶¹ He continued, “[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁶² In their appellate briefs, the Boy Scouts

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 650-51 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (1999), *rev’d*, 530 U.S. 640 (2000)).

58. *Dale*, 734 A.2d at 1226.

59. *Boy Scouts of Am.*, 530 U.S. at 651.

60. *Id.*

61. *Id.* (quoting *Democratic Party of the United States v. Wis. ex rel La Follette*, 450 U.S. 107, 124 (1981)).

62. *Id.* (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981)).

claimed they taught their members that homosexual conduct is not morally straight.⁶³ The Court accepted that assertion as true.⁶⁴ For that reason, there was no need to inquire further.⁶⁵ Why? Because it is not the business of the Court to determine if a particular view is unwise or irrational, and the record clearly establishes the Boy Scouts' view on homosexuality.⁶⁶ The Court concluded that the Boy Scouts' professed beliefs about homosexual conduct were sincere.⁶⁷ Finally, the majority noted the fact that the Boy Scouts had publicly and consistently expressed the same views with respect to homosexual conduct by its pleadings in prior litigation.⁶⁸

The next question faced by the Court was "whether Dale's presence as an assistant scout-master [would place a significant burden on] the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"⁶⁹ The Chief Justice noted, "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."⁷⁰ Collectively given Dale's publicized interview about his sexual orientation, his co-presidency of the gay and lesbian organization in college, and his continued gay rights activities, it is obvious that his presence would force the Boy Scouts to send a message, against their will, that they accept and even highly regard homosexual conduct as a legitimate form of behavior.⁷¹

The Court turned to the holding in *Hurley* as a basis for its belief that Dale's presence would force the Boy Scouts to send a message that they

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 651-52.

67. *Id.* at 652. The Boy Scouts' 1993 position statement reads:

The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

Id. (citations omitted).

68. *Id.* at 652-53; see *Curran v. Mount Diablo Council of Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998).

69. *Boy Scouts of Am.*, 530 U.S. at 653 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

70. *Id.*

71. *Id.*

condone homosexual conduct.⁷² Recall that *Hurley* involved the question of whether Massachusetts' public accommodations law would require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bi-sexual group called GLIB.⁷³ GLIB contended that the parade organizers violated their First Amendment rights by denying them the opportunity to march.⁷⁴ In that case, the Court observed "that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."⁷⁵ The Court stated:

[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bi-sexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.⁷⁶

Here, the Court found that the Boy Scouts legitimately believe "that homosexual conduct is inconsistent with the values it seeks to instill in its . . . members."⁷⁷ That is so, just "[a]s the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' [First Amendment rights not to be forced] to propound a particular point of view."⁷⁸ Dale's presence as an assistant scout master in a Boy Scout troop would just as surely interfere with the Boy Scouts'

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 654 (alteration in original) (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 574-75 (1995)).

77. *Id.*

78. *Id.*

choice not to suggest a view on homosexuality contrary to its own beliefs.⁷⁹

Next, the Court turned to the New Jersey court's "determination that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster."⁸⁰ The New Jersey Court found that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality."⁸¹

Chief Justice Rehnquist wholly disagreed with the New Jersey Supreme Court's conclusion for three reasons. First, he fiercely stated that associations did not have to associate "for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."⁸² It is enough that an association may engage in expressive activity that could be impaired by Dale's presence in order to be entitled to protection.⁸³ Rehnquist cited *Hurley* for the proposition that a gay group could be excluded from marching in a parade even when the purpose of the parade was not to espouse any views whatsoever about sexual orientation.⁸⁴

Secondly, Chief Justice Rehnquist said that even if the Boy Scouts discouraged leaders from disseminating views on sexual issues, "the First Amendment protects the Boy Scouts' method of expression."⁸⁵ Even if Boy Scout leaders try to dodge questions of sexuality and teach only by example, their approach does not impeach the sincerity of their beliefs concerning homosexuality.⁸⁶

Thirdly, Rehnquist found that "the First Amendment . . . does not require . . . every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"⁸⁷ Dale argues that the Boy Scouts do "not revoke the membership of heterosexual Scout leaders

79. *Id.*

80. *Id.*

81. *Id.* at 654-55 (emphasis in original) (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000)).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

that openly disagree with the Boy Scouts' policy on sexual orientation."⁸⁸ The Court decided that even if true, this statement is irrelevant.⁸⁹ The fact that the Boy Scouts take an official position with respect to homosexual conduct is in itself sufficient for First Amendment purposes.⁹⁰ The Chief Justice opined that "[t]he presence of an avowed homosexual and gay rights activist [like Mr. Dale] in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."⁹¹ The Boy Scouts clearly have a First Amendment right to choose one message and not the other.⁹² The fact that this organization tolerates dissent within its ranks does not mean that its views are stripped of their First Amendment protection.⁹³

The next question that the Court faced was whether the imposition of New Jersey's public accommodations law requiring the Boy Scouts to accept Dale violates the Boy Scouts' freedom of expression.⁹⁴ The Court was very concerned about the broad parameters of New Jersey's public accommodations law.⁹⁵ The Statute lists over fifty different types of places in its definition of a place of public accommodation.⁹⁶ The Court pointed out that the New Jersey Supreme Court "applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location."⁹⁷ The law covers traditional places like taverns, hotels, shops, and libraries.⁹⁸ However, the law also sweeps within its grasp more imprecise locations such as summer camps and playing fields.⁹⁹

88. *Id.*

89. *Id.* In the view of the Court, the record shed some doubt on Dale's claim. "For example, the National Director of the Boy Scouts certified that 'any persons who advocate to Scouting youth that homosexual conduct is' consistent with Scouting values will not be registered as adult leaders." *Id.* at 655 n.1 (citations omitted).

90. *Id.* at 655.

91. *Id.* at 655-56.

92. *Id.* at 656.

93. *Id.*

94. *Id.*

95. *Id.* at 656-57. The majority stated, "Over time, the public accommodations laws have expanded to cover more places. New Jersey's statutory definition of '[a] place of public accommodation' is extremely broad. The term is said to 'include but not limited to,' a list of over [fifty] types of places." *Id.*

96. *Boy Scouts of Am.*, 530 U.S. at 657.

97. *Id.*

98. *Id.*

99. *Id.*

The Court declared in cases such as *Roberts and Board of Directors of Rotary International v. Rotary Club of Duarte*¹⁰⁰ that the “states have a compelling interest in eliminating discrimination against women in public accommodations.”¹⁰¹ Nevertheless, the Court declared that in each of those cases enforcement of the public accommodations statutes “would not materially interfere with the ideas that the organization[s] sought to express.”¹⁰² In *Roberts*, the Court said that the “Jaycees [had] failed to demonstrate . . . any serious burdens on the male members’ freedom of expressive association.”¹⁰³ In *Duarte*,¹⁰⁴ the Court wrote:

[I]mpediments to the exercise of one’s right to choose one’s associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.¹⁰⁵

In contrast, New Jersey’s public accommodations law directly impacts associational rights that enjoy First Amendment protection by compelling the Boy Scouts to accept Dale.¹⁰⁶ Accordingly, Dale’s presence places an intolerable burden on the Boy Scouts’ freedom of expressive association. Why? Because his presence implies acceptance of homosexual conduct. The Court stated that New Jersey’s public accommodations law does “not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”¹⁰⁷ The dissent

100. Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

101. *Boy Scouts of Am.*, 530 U.S. at 657.

102. *Id.*

103. *Id.* at 657-58 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984)).

104. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Court considered a situation in which the charter of a local chapter of Rotary International was revoked by the national organization, because it admitted female members. Here, the Court concluded “the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection.” *Id.* at 546. It emphasized the Rotary Club’s inclusive membership policy, pointing to its own declaration that “[t]he purpose of Rotary ‘is to produce an inclusive, not exclusive, membership.’” *Id.* Importantly, Rotary’s membership policy was designed to be inclusive in order to enable “the club to be a true cross section of the business and professional life of the community.” *Id.* (citations omitted).

105. *Boy Scouts of Am.*, 530 U.S. at 658 (quoting *Duarte*, 481 U.S. at 548).

106. *Id.* at 659.

107. *Id.*

berates the majority, because the latter fails to recognize that gayness is regarded by many citizens as compatible with a clean and morally straight lifestyle.¹⁰⁸ However, the Chief Justice's retort was that the First Amendment protects expression, popular or unpopular, by citing decisions of unpopular cases involving flag burning and the Ku Klux Klan.¹⁰⁹ Rehnquist also mentioned that the Court's personal views must not influence its decision regarding the Boy Scouts' treatment of gays, regardless whether such treatment is right or wrong.¹¹⁰ The Court held by a close 5-4 vote that the First Amendment prohibits the State from imposing a requirement that Dale be made an assistant scoutmaster.¹¹¹

III. THE DISSENT

Justice Stevens authored a ringing dissent in response to the majority's determination that Dale's presence intrudes on the Boy Scouts' freedom of association. First, in perhaps a gentle jab at the majority (who are normally strong supporters of federalism), Stevens said that New Jersey should be commended for its attempts to eradicate the cancer of discrimination from society.¹¹² The Court, Stevens noted, simply failed to accord that State the respect it is due in our federal

108. *See id.* at 699-700.

109. *Id.* at 660 (citing *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that there is a right to burn one's American flag); citing also *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that Ku Klux Klan leaders had a First Amendment right to advocate unlawfulness)).

110. *Id.* at 661.

111. *See id.*

112. *Id.* at 663 (citing Justice Brandeis' comment in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion),

To stay experimentation in things social and economic is a grave responsibility . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.).

The Chief Justice's response to Brandeis' comment was that in *New State Ice*, he was speaking of experimentation regarding economic matters during the depression years. *Boy Scouts of Am.*, 530 U.S. at 660. Rehnquist implies that Brandeis was a champion of free speech in matters of expression. *Id.* Brandeis thought that the founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Id.* at 660-61 (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., 395 U.S. 444 concurring), *overruled in part by Brandenburg v. Ohio*, (1969)).

system.¹¹³ Next, the dissent claims “[i]t is plain as the light of day” that the terms “morally straight” and “clean” have nothing to do with homosexuality.¹¹⁴ Further, it is just as clear that scoutmasters neither give information nor advice about sexual matters, but rather leave that to the parents.¹¹⁵ Finally, the Boy Scouts’ pronouncements simply declare that homosexuality is not “appropriate.”¹¹⁶ Consequently, this idea or principle of excluding gays does not appear to be a part of the Boy Scouts’ publicly taught values and creeds.¹¹⁷ The dissent maintained that there was no connection between these essentially private policy statements and the Boy Scouts’ expressive interests¹¹⁸ that justify the majority’s decision. The dissent seemed to think that the Boy Scouts’ failure to forcefully and publicly advocate their concern with gayness was somehow evidence of an acceptance of homosexuality or the lack of an expressive objection to the practice of that lifestyle.¹¹⁹ Perhaps the question for the Boy Scouts is whether they should have been more outspoken or bigoted toward gays?¹²⁰

Next, the minority opinion maintained that in order to win an expressive association claim, the Boy Scouts must show *more* than merely some expressive activity.¹²¹ They must also establish a serious burden on the group’s collective effort.¹²² But in the minority’s view, Dale’s presence was not a serious burden on the Boy Scouts. This was so because the Boy Scouts never demonstrated that Dale would in any way advocate his beliefs to the youngsters in his charge.¹²³

Justice Stevens recognized that the Boy Scouts had a First Amendment right to not talk about homosexuality to its youthful

113. *Boy Scouts of Am.*, 530 U.S. at 664.

114. *Id.* at 668.

115. See *id.*

116. *Id.* at 673.

117. *Id.* “Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives” *Id.*

118. *Id.* at 676.

119. See *id.* at 677-78.

120. At least that was the opinion of one writer. Writing about the New Jersey Supreme Court decision he said, “By the perverse logic of this decision, the Boy Scouts erred not in the direction of bigotry but rather in not being bigoted enough.” Terence Pell, *Not Bigoted Enough*, WASH. POST, Aug. 23, 1999, at A17, available at 1999 WL 23299503.

121. *Boy Scouts of Am.*, 530 U.S. at 682.

122. See *id.* at 683; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984).

123. *Boy Scouts of Am.*, 530 U.S. at 689.

members.¹²⁴ However, that interest could be accomplished by directing adult leaders not to discuss matters relating to sex and religion.¹²⁵ According to Stevens, the Boy Scouts' concern that Dale would use his position as a "bully pulpit"¹²⁶ to convey his ideas on homosexuality has no basis in fact.¹²⁷ In addition, there is no indication that Dale would disobey Boy Scout policies.

Next, Justice Stevens took great issue with the majority's conclusion that Dale's presence would send a message that the Boy Scouts endorsed a gay life style.¹²⁸ He argued that the majority's reliance on *Hurley* was misplaced.¹²⁹ Recall in *Hurley* that a gay group wished to march in a private organization's St. Patrick's Day parade with a large banner to express their gay pride.¹³⁰ The Court concluded that the parade organizers, a private group, could not be compelled to proclaim a belief with which it disagreed.¹³¹

Here, Justice Stevens said that Dale's presence at a scout meeting was nothing like marching in a parade with a banner.¹³² Contrary to *Hurley*, Dale neither carries a banner nor openly advocates his views at troop meetings.¹³³ Mere attendance at a meeting is not enough to rise to the level of expression.¹³⁴ Usually, an expressive association claim involves at least the "avowal and advocacy of a consistent position on some issue over time."¹³⁵ The fact that a gay man participates in an organization no more conveys a support for the lifestyle than does a gay person participating in baseball, tennis, or golf.¹³⁶

Finally, the dissenters reminded us that "[u]nfavorable opinions about homosexuals 'have ancient roots.'"¹³⁷ As a result of free interaction

124. *Id.* at 688.

125. *Id.*

126. *Id.* at 689.

127. *Id.* "BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked." *Id.*

128. *See id.* at 692-97. Stevens forcefully argued that the majority's reliance on the simple fact that Dale is gay somehow sent a message endorsing homosexuality was wrong. Such a presumed message is the same as a "constitutionally prescribed symbol of inferiority." *Id.* at 696.

129. *Id.* at 693-95.

130. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 561 (1995).

131. *See id.* at 573.

132. *Boy Scouts of Am.*, 530 U.S. at 694-95.

133. *Id.* at 695.

134. *Id.*

135. *Id.* at 696.

136. *See id.* at 697.

137. *Id.* at 699 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by*

between people, these ancient and unfavorable opinions have consistently been modified.¹³⁸ The minority opinion cited examples of domestic partner legislation, greater understanding in religious faiths, and removal of homosexuality from a list of mental disorders to support this idea of modification.¹³⁹ Indeed, it is apparent that the publicly avowed view toward gays is heavily tilted toward acceptance. In contrast, the authors of this article take the position that sexual conduct between consenting adults is absolutely none of the State's concern. Of course, the majority's response to this was that the Boy Scouts' position on homosexuality did not have to be rational or reasonable to fall under First Amendment protection.¹⁴⁰

But what relevance does any of the foregoing have to do with voluntary association? Let us stipulate that Dale is a very honest, upright, religious, witty, and moral person whom we would trust to care for and educate our children. And we further posit that his sexual orientation has absolutely no effect on his abilities to be a wonderful scoutmaster. These provisos notwithstanding, it is still illicit for the government to compel one person to associate with another just because the latter is of good moral character. Perhaps one prefers associating with his or her friends who smoke cigarettes, drink beer, play poker, eat fatty steaks, tell dirty jokes, and watch pornographic movies. Could the government legitimately compel that person to shun his or her disreputable friends and instead go camping with the sainted Mother Theresa, or even Dale, just because they are of good moral character? We think not; the whole idea is preposterous in a free society. In the end, whether gay leaders are compatible with family values is not the fundamental issue. Rather, it is whether an organization has the right to set its own membership rules. These specifications for joining may not fit with some of today's politically correct social norms. They might be hurtful to an individual's feelings. But at the end of the day, the alternative to the right of exclusion is total state control of private association. We need not succumb to the tyranny of the supposed good intentions of the state of New Jersey. We think that James Madison would appreciate the Boy Scouts' moral courage in standing up for his First Amendment.¹⁴¹

Lawrence v. Texas, 539 U.S. 558 (2003)).

138. *Id.*

139. *Id.* at 699-700.

140. *See id.* at 660.

141. *See supra* note 112. According to James Madison, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." (citations omitted). For more on this question of the government practice of

IV. PHILOSOPHY

According to the New Jersey Supreme Court, the Boy Scouts are guilty of an egregious offense against morality, propriety, and most importantly, the law, in their decision to exclude gays as scoutmasters. This philosophical position taken on by the court in this decision is that discrimination, on the basis of an entire litany of criteria, is wrong and should be proscribed by law. The finding of this court, however, is philosophically flawed. Indeed, it is so dead from the neck up that even the adherents of this perspective are unable to carry through on their own principles and apply them widely.

For example, while employers may not exclude or discriminate against employees on the basis of race, gender, national origin, sexual preference, etc., the latter are not at all proscribed by law from doing just that with regard to the former. That is, if a prospective employee declines to take a job with Brigham Young, Loyola, or Yeshiva Universities on the grounds that their religious mission offends him, that person is still in full compliance with the law. But let any one of them apply a similar criterion in their hiring of professors, and all hell breaks loose, legally speaking. Needless to say, it would be a matter of outlawry for them to refuse to employ scholars for these reasons.

Suppose people decide to go out to dinner together but eschew all Chinese, black,¹⁴² Jewish, and Italian restaurants, not on the ground that

compelling people to support opinions with which they disagree see Roy Whitehead & Walter Block, *Mandatory Student Fees: Forcing Some to Pay for the Free Speech of Others*, 20 WHITTIER L. REV. 759, 772 (1999).

142. (The non-politically correct language in this article has been left unedited due to one of the author's heartfelt insistence.) I (one of the authors) like to treat blacks and whites exactly alike, both personally, professionally, and, of relevance here, linguistically. To call blacks African Americans violates this, unless we also call whites European Americans, and I am not willing to employ this latter language; one, because it seems silly to my ear; and two, because it is simply not in common use and would needlessly raise eyebrows. I certainly would not capitalize white and use lower case for black, or vice versa. And of course, I do no such thing in this paper. Another reason: "African American" is not at all precise. For example, what do you call a man now living in the U.S. with very white skin, blue eyes, blond hair and whose parents have lived in South Africa or Zimbabwe (formerly Rhodesia) for centuries and originally immigrated there from England or Holland? If anyone is an "African American," this guy surely is. But that would just spread confusion, for this guy looks white to everyone, is white, considers himself white, and would certainly not be eligible for any sort of U.S. affirmative action program reserved for blacks. Yet another reason for my choice of words is that people on the left use "African American." People on the right do not. I do not consider myself a member of either of these two groups; I am a libertarian. A push in

their culinary offerings do not appeal to them, but rather because they loathe the nationalities thereby represented. Are they thereby guilty of law breaking? They are not. But were any of these establishments to make similar choices with regard to employees or customers (e.g., by posting a sign on their premises stating “no Chinese, blacks, Jews, or Italians will be allowed entry either as patrons or workers”) then it would be a paradigm case of law violation.

This fact, that the burden of non-discrimination is uneven, has further interesting ramifications. For example, sellers are typically forbidden to discriminate, but not buyers; but even this is by no means the end of the story. A diner can patronize an Italian restaurant, avoiding one offering Chinese food, even if this is motivated by racial or ethnic hatred. However, a Greek eating establishment may not ban Turkish diners even when this decision is precipitated by similar emotions. On the other hand, were any of these restaurants to decide not to hire (e.g., purchase the services of) Jews or blacks,¹⁴³ they would quickly be found to be in violation of anti-discrimination law.

If the same establishments were to avoid purchasing meats or vegetables from gays, females, or Spaniards, their (legal) guilt would turn on the issue of whether they shop for these things in a supermarket (in which case they could discriminate to their heart’s content) or let these things out to competitive bidding contracts (in which case they could not discriminate on race, sex, gender, or ethnicity; however, it would be legal for them to discriminate on the basis of price, e.g., accept the lowest bid). One of the criteria of good law is surely intellectual coherence, something under which such legislation does not pass muster.

Moreover, if it is really true that discrimination is a cancer,¹⁴⁴ which must presumably be wiped out entirely then why do we countenance it in personal relations? For example, dating. Why does the law not force all of those who wish to engage in this practice, whether gay or straight, *not* to discriminate on the basis of race? If blacks¹⁴⁵ are fourteen percent of the overall population then every seventh date of a white person would

either direction is a violation of my free speech rights. It is an attempt to impose upon me a political stance that I do not wish to embrace.

143. See *supra* text accompanying note 142.

144. The New Jersey Supreme Court says that the goal of LAD is to remove the cancer of discrimination. Specifically, the court stated, “[T]he overarching goal on the [LAD] is nothing less than the eradication ‘of the cancer of discrimination.’” *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1208 (N.J. 1999) (quoting *Jackson v. Concord Co.*, 253 A.2d 793 (N.J. 1969)).

145. See *supra* text accompanying note 142.

have to be with a member of this community. Marriage and friendship patterns, too, would have to come under the eagle eye of the discrimination police. Present intermarriage rates are evidence of the fact that blatant discrimination takes place in this arena.

And, as it happens, *both* heterosexuals and homosexuals are “guilty” of sexual discrimination. Male homosexuals, for example, abjure women as bed partners, as do female heterosexuals. Female homosexuals forswear men which is the same practice of male heterosexuals. If discrimination must be eliminated then all of this “evil” behavior should be proscribed, forthwith. Only bisexuals would be acting lawfully. The logical implication of the court in *Dale v. Boy Scouts of America* is that of compulsory bisexuality for everyone. Until and unless they are willing to embrace this consistent application of their own philosophy, they are forced by the laws of logic to change their verdict.

Furthermore, “[a]ll-boys schools are attacked for discrimination, but all-girls schools are consistent with the needs of diversity. All-white clubs are verboten, but all-black clubs are a healthy reflection of racial pride. All-Christian schools are pockets of bigotry, but all-atheist schools are essential to pluralism.”¹⁴⁶ The law mandates that girls be accepted for boys’ sports teams, but the reverse does not apply. Were girls’ sports teams forced to allow male participation and if ability were still the determining factor for inclusion, this would pretty much spell the death knell for all female participation in athletics, with the possible exception of such activities as golf, and “ballet sports” such as gymnastics, diving, and synchronized swimming.¹⁴⁷ Certainly, it would be the rare female who could hold her own vis a vis males in football, baseball, basketball, etc.

Consider the fact that the Black Muslim group of Malcolm X was not forced to admit whites; that religious groups such as Mormons, Jews, Catholics, etc., may legally exclude non-members from (certain aspects of) their services. There is also the fact that there is a strict enforcement of male only and female only rest rooms: neither may “poach” upon the preserves of the other; each, that is, may exclude the other.

146. Llewellyn H. Rockwell, Jr., *The Right to Exclude*, MISES INSTITUTE, at <http://www.mises.org/fullstory.aspx?control=282&id=76>.

147. See Roy Whitehead et al., *Gender Equity in Athletics: Should We Adopt a Non-Discriminatory Model?*, 30 U. TOL. L. REV. 223 (1999); Roy Whitehead & Walter Block, *Christian Landlords and the Free Exercise Clause: Sinners Need Not Apply*, AKRON L. REV. (forthcoming).

Conceivably, all of these decisions may be “justified.” Perhaps employers are more powerful or have better bargaining power than employees.¹⁴⁸ Even if this is so, this is unrelated to racial or gender discrimination. If this is legally offensive, *per se*, then mere wealth should be irrelevant. After all, the rapist cannot defend his actions on the ground that his victim is richer than himself. In any case, it is the *customer*, not the owner of the restaurant, “who is always right.” If there is any imbalance of power in that scenario, it presumably cuts in precisely the opposite direction. For example, since the patron of an eating establishment holds a thumbs up or thumbs down vote then it should be, if anyone, the owner and not the customer who would have the right to freely pick and choose.

This court’s finding is also philosophically flawed in that it ignores the fact that private property rights are in effect a license to exclude. The entire point of such rights is to draw a line between “mine” and “thine.” If a man cannot exclude others from his premises then there is a strong sense in which they are not *his* premises at all.

Llewellyn Rockwell states:

But liberty also means the right to exclude because property owners decide questions of access. There is no right to crash a private dinner party, for example. The owners of the house have the right to invite or not invite on any grounds. Similarly, there is no right to invade a private organization.¹⁴⁹

If private male-only golf courses cannot be forced to admit women, it would appear to be a legal stretch to compel the Boy Scouts to welcome gays in their senior ranks.

The New Jersey Supreme Court attempted to argue its way out of this conundrum by defining the Boy Scouts as a “public accommodation.”¹⁵⁰ But this is a philosophical howler of the first magnitude. For this organization is not at all “open to the entire public.” Rather, it is receptive *only* to those members of the public who meet its membership criteria and this most certainly does not include gay scoutmasters. Moreover, were the “public accommodation” doctrine

148. This will come as a surprise to the employers of Michael Jordan or of marginal farmers during harvest when they are desperate for workers.

149. Rockwell, *supra* note 146, at <http://www.mises.org/fullstory.aspx?control=282&id=76>.

150. *Id.*

pushed to its logical conclusion, it would spell the death knell of private property. Any property, without exception, is open to *some* members of the public; even private homes and clubs. To infer that if an owner is willing to engage his property with *some* people then he, therefore, must be forced to do so with *all* people is logically invalid.

If the real reason for this attack on the liberties of Americans is not and cannot be a concern with discrimination (as shown by the fact that the court will not consistently apply this tyrannical principle), nor yet is it “public accommodation” (because this mischievous doctrine undermines all property rights), what then is the true explanation for this loss of our liberties?¹⁵¹ In a word, it is concern with victims (but only with *some* victims) who are embraced by the forces of political correctness. Rockwell asks in this regard:

What if the Boy Scouts had decided to exclude, say, racists as Scout masters. Would the courts have intervened on behalf of, for example, a Klan member's right to join? Not on your life. This is not an equal application of the law, but one that favors interest groups approved by government.¹⁵²

In this regard, it is more than passing curiosity that gays, who have long been associated with the view that they should be allowed a sphere of privacy in the bedroom or in the bathhouse for acts between consenting adults, are now intent upon violating the private spaces of those who do not welcome them.

The legal precedent for the present diminution of property rights is the 1948 Supreme Court decision abrogating restrictive covenants that mentioned race.¹⁵³ *Shelley v. Kraemer*¹⁵⁴ mandated restrictive covenants not be enforced.¹⁵⁵ But if property rights and contracts are undermined by judicial decisions, the rot infects our entire society.¹⁵⁶ If civilization is

151. It is surely a paradox that at a time when the United States armed forces are conducting an expedition ostensibly to promote the liberties of the Iraqis, liberties at home are in great danger.

152. Rockwell, *supra* note 146, at <http://www.mises.org/fullstory.aspx?control=282&id=76>.

153. *Id.*

154. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

155. *Id.*

156. Rockwell, *supra* note 146, at <http://www.mises.org/fullstory.aspx?control=282&id=76>.

built upon these twin pillars, to the extent they are diluted, our entire social order is put at risk.

In sharp contrast to *Shelley* is the following ringing endorsement of contractual and private property rights mandating that the state not

limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.¹⁵⁷

“But in 1967, the U.S. Supreme Court struck that amendment down -- on the same grounds that the New Jersey court ruled against the Boy Scouts.”¹⁵⁸

In Rockwell’s view:

Since then the right of free association has experienced many blows, from the 1964 Civil Rights Act, which defined any business enterprise as a public accommodation to be controlled by government, straight to this New Jersey decision. If a group is politically powerful enough, it can have the tyrants in black robes override anyone's property rights.¹⁵⁹

Libertarians¹⁶⁰ oppose not only this attack by a gay man on that venerable institution, the Boy Scouts. They also dispute the entire

157. *Id.* These words appear in a 1964 amendment to the California Constitution. CAL. CONST. art. I, §26 (repealed 1974).

158. Rockwell, *supra* note 146, at <http://www.mises.org/fullstory.aspx?control=282&id=76>; see generally *Reitman v. Mulkey*, 387 US. 369 (1967).

159. *Id.* For a philosophical view on the right to discriminate see Jan Narveson, *Have We a Right to Non-Discrimination?*, in BUSINESS ETHICS IN CANADA 183, 183-98 (1987); Walter Block, *Discrimination: An Interdisciplinary Analysis*, 11 JOURNAL OF BUS. ETHICS 241, 241-54 (1992) [hereinafter Block, *Discrimination*]; Walter Block, *Compromising the Uncompromisable: Discrimination*, 57 AM. JOURNAL OF ECON. & SOCIOLOGY 223, 223-37 (1998) [hereinafter Block, *Compromising the Uncompromisable*].

160. For the libertarian philosophy which underscores the underlying intellectual basis of this section, indeed of the entire paper, see MURRAY N. ROTHBARD, FOR A NEW LIBERTY (reprinted ed., Libertarian Review Foundation 1985) (1973); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA

philosophy upon which such a lawsuit rests. Nor is it only a matter of a “slippery slope;” the iceberg is already upon us, not just its tip. If an organization such as the Boy Scouts can be successfully assaulted in the courts by a gay person then reductio ad absurdum are all but impossible.

V. ECONOMICS

Why is it that we have run so far off the rails in terms of anti-discrimination law? How is it that we have arrived at a point where compulsory bisexuality is the only practice consistent with legislation in this area? Can it really be required by law that parents be forced to send their impressionable adolescent boys to an organization featuring gay scoutmasters?

There are many plausible explanations for this sorry state of affairs: a failure of the will, rampant immorality, sheer bloody minded busy-bodyness, an altogether perverse interpretation of the otherwise reasonable desire to help the underdog, philosophical confusion, and “bloody cheek” in the British expression. But we must not, in casting around for blame on this matter, neglect the dismal science. Economic illiteracy also goes a long way toward explaining why so many segments of our society should either have embraced the anti-discrimination idea with alacrity or at least accorded it passive acceptance.

The major fallacy underlying the so called civil rights movement is the idea that discrimination, particularly on the part of the rich and powerful,¹⁶¹ is economically deleterious to the downtrodden. Indeed, this is an important source of poverty, if not the major explanation for this state of affairs.¹⁶² Visions of employers turning away blacks¹⁶³ from the

(1974); WALTER BLOCK, DEFENDING THE UNDEFENDABLE (Fox and Wilkes 1991) (1976); Walter Block, *Libertarianism vs. Libertinism*, 11 JOURNAL OF LIBERTARIAN STUDIES 117, 117-28 (1994); CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN (1997); JAN NARVESON, THE LIBERTARIAN IDEA (1988); ANTHONY DE JASAY, THE STATE (Liberty Fund, Inc. 1988) (1985).

161. There are three main sources of economic discrimination: on the part of employers, fellow employees, and customers. In keeping with popular sentiment on this matter, we shall confine our remarks to the discrimination on the part of employers where such discrimination, as we shall show, is powerless to harm the economically weak.

162. On the economics of discrimination see GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); Walter Block, *Economic Intervention, Discrimination, and Unforeseen Consequences*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY: AN ECONOMIC AND SOCIAL PERSPECTIVE 103-24 (Walter E. Block & Michael A. Walker eds., 1981) [hereinafter Block, *Unforeseen Consequences*]; Walter Block & Walter Williams, *Male-Female Earning Differentials: A Critical Reappraisal*, 2

factory door or enforcing sweatshop conditions on economically powerless women dance in the minds of those determined that discrimination shall not legally take place on the basis of race, sex, ethnicity, sexual preference, or any of a continually increasing number of considerations.

The only difficulty with this perspective is that it happens not to be true. For instance, compare the wage “gap” between male and female workers. According to the most popular hypothesis, the fact that females earn only some seventy cents for every dollar garnered by a male is *per se* proof of male chauvinist employer exploitation.¹⁶⁴ The implicit claim is now that acknowledged male advantages over females in upper body strength are less and less economically relevant, there are no differences in productivity levels on average between the two genders. This is also, as it happens, a not unreasonable surmise. (If it were conceded that females were less productive in the market place than males, this would furnish an alternative explanation for the wage gap.) This situation gives rise to the following two by two matrix:

	Male	Female
Wages	\$10	\$7
Productivity	\$10	\$10

J. LAB. RES. pt. 2, 383-88 (1981); WALTER BLOCK & MICHAEL A. WALKER, ON EMPLOYMENT EQUITY: A CRITIQUE OF THE ABELLA ROYAL COMMISSION REPORT (1985) [hereinafter BLOCK & WALKER]; Harold Demsetz, *Minorities in the Market Place*, 43 N. C. L. REV. 271, 271-97 (1965); RICHARD EPSTEIN, FORBIDDEN GROUNDS (1992); Carl Hoffman & John Reed, *When Is Imbalance Not Discrimination?*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY: AN ECONOMIC AND SOCIAL PERSPECTIVE 187-215 (Walter E. Block & Michael Walker eds., 1981); W. H. HUTT, THE ECONOMICS OF THE COLOUR BAR: A STUDY OF THE ECONOMIC ORIGINS AND CONSEQUENCES OF RACIAL SEGREGATION IN SOUTH AFRICA (1964); ELLEN FRANKEL PAUL, EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE (1989); THOMAS SOWELL, ETHNIC AMERICA (1981); Thomas Sowell, *Weber and Bakke, and the Presuppositions of “Affirmative Action,”* in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY: AN ECONOMIC AND SOCIAL PERSPECTIVE 37-63 (Walter E. Block & Michael A. Walker eds., 1981); THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE (1983); THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); THOMAS SOWELL, RACE AND ECONOMICS (Longman, Inc. 1975) (1975); WALTER E. WILLIAMS, THE STATE AGAINST BLACKS (1982); WALTER WILLIAMS, *On Discrimination, Prejudice, Racial Income Differentials, and Affirmative Action*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY: AN ECONOMIC AND SOCIAL PERSPECTIVE 69-99 (Walter E. Block & Michael A. Walker eds., 1981).

163. See *supra* text accompanying note 142.

164. These numbers are for illustrative purposes only.

Here, males and females have equal productivity at \$10 per hour respectively. However, based on a wage gap of 30%, the former earn \$10 per hour while the latter suffer under wages of only \$7 per hour.

There are grave difficulties with such a scenario. Were the scenario true, it could not long endure. For it implies that any employer who hires a woman will earn \$3 per hour more in profits than were he to hire a man. Surely, under the conditions specified above, the firm dominated by female employees will be able to underbid, and price out of the market, all competitors with a different make-up in their work forces. Surely, under these conditions, any but the most warped employer would prefer to hire a woman (thus raising her salary) to a man and would continue doing so until the wages of each came to conform to the other. (Given our numerical example, wages in equilibrium would reach \$10 for both genders; at this point, there would be no additional profits earned by the entrepreneur for hiring women that would not be available to him were he to hire men.)

What, then, is the true explanation for the undeniable fact that women's earnings are appreciably below that of their male counterparts? If the discrimination hypothesis must be confined to the dust-bin of economic history, what can take its place? In large part, it is the marital asymmetry hypothesis: men earn more money in the market place than women, because marriage has asymmetrical effects on pay; it enhances that of the husband and reduces that of the wife. Since most people are married for at least some years of their adult lives, this biases the statistical differentials upon which the feminists¹⁶⁵ have pegged their misbegotten "wage gap" complaints.

165. For a critique of feminism see Michael Levin, *Comparable Worth: The Feminist Road to Socialism*, in 78 COMMENTARY No. 3 (Sept. 1984); MICHAEL LEVIN, *FEMINISM AND FREEDOM* (1987); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN* (1994).

Why the asymmetry? This is because husbands and wives do not equally divide housekeeping and child rearing responsibilities. Very much to the contrary, the wife assumes the lion's share of these tasks and the husband assumes a very small proportion, even including repairs and garbage removal. In virtually all marriages, the shopping, cooking, cleaning, sewing, bed making, vacuuming, and dishwashing are almost entirely monopolized by the distaff side. This goes in spades for diapering, PTA meetings, caring for sick children, etc. Also, this is to say nothing of getting up in the middle of the night and being on call every few hours during the day in order to breast feed, a biological impossibility for men.

What is the implication of such a state of affairs? It is what economists call the doctrine of alternative costs. If you want to be a concert pianist and practice your instrument eight hours a day, you probably will not be very good at golf, chess, computers, or hundreds of other things; you certainly will not be as productive in these other tasks but for your tie to the piano. If you load yourself up with house and child-care, compared to your otherwise equally productive in the marketplace husband, he will gain a march on you in the latter direction. Moreover, if a woman expects to seriously or totally reduce her labor force attachment from the time her first child is born until her last child is in high school and thus relatively independent, she is likely to invest her human capital in less well paid, but presumably more secure arenas, such as secretary, nurse, or school teacher; rather than invest in the more remunerative chemistry, computers, or engineering lest the natural atrophy of her skills during her time of zero or lesser labor force participation hurt her financially. Given that her husband is the primary bread-winner for these years, she is far more likely to agree to be the "trailing spouse" in the job market than the reverse, in order to maximize total family income.

What are the results of these considerations? It is that while *on average* women should earn just as much as men, given that the average woman is just as productive as the average man, matters are quite different when we take into account marital status. If wage ratio of all females to all males is seventy percent to one hundred percent, it drops precipitously for those who have ever been *married* and rises to virtual equality for those who have *never* benefited from the institution of marriage. Indeed in many cases, the wage "gap" for those who have never married vanishes almost entirely!¹⁶⁶

166. Block, *Discrimination*, *supra* note 159, at 246-48; Block, *Compromising the*

The same analysis applies to discrimination against any other group, such as blacks,¹⁶⁷ homosexuals, or members of the various ethnicities. Discrimination is not the economic bugaboo that it is commonly supposed to be. Much discrimination was aimed at Jews and Orientals¹⁶⁸ and yet they had higher than average incomes; discrimination did not reduce their economic viability. Given that blacks¹⁶⁹ and Hispanics are also the objects of discrimination, this cannot account for their relative poverty.

If a restaurant does not wish to serve an oriental¹⁷⁰ person, there will be competitors anxious to do just that. They will earn greater profits, other things equal, since they can “monopolize” customers from this sector of society. If a firm does not to choose to employ a gay person, he will find a job elsewhere. His new employer, more likely than not, will be able to undersell and drive into bankruptcy the first one. No, there is nothing to fear from discriminators. They are a paper tiger. Fear of them is certainly not a justification for riding roughshod over the rights of the citizenry to do exactly as they wish, to choose their friends, business associations, and personal relationships, provided only that they keep their mitts off of other people and their property.

Uncompromisable, supra note 159, at 223-37.

167. *See supra* text accompanying note 142.

168. (The non-politically correct language in this article has been left unedited due to one of the author’s heartfelt insistence.) A similar argument stated previously in note 142 applies to Orientals - Asians. To be fair to both races, if we use “Asian” to describe an Oriental then we would have to (if we are to be logically consistent) use “European” or “American” to describe an Occidental. That would spread confusion. Then, too, to characterize a person whose family has lived in the U.S. for several centuries, but who originally migrated to the U.S. from Korea, Japan, or China, as an “Asian” isn’t just plain silly. Worse, it is confusing.

169. *See supra* text accompanying note 142.

170. *See supra* text accompanying note 168.

VI. STATISTICAL EVIDENCE

What are the facts of the matter? In table one,¹⁷¹ the ratios of female to male median incomes are listed [(in 1997 dollars)] for the years 1987-1997.¹⁷² As can be seen, the ratio for all males and females ranges from a low of 46.7% in 1987 to 55.1% in 1997; from 77.9% to 81.0% for the single, never married during these years; and from a low of 36.9% in 1987 to a high of 47.1% in 1997 for those who were married, widowed, separated or divorced. The point at issue is not the slight rise in all these figures over this eleven year period, but rather the fact that the reason female wages lag behind male wages for the total population is that those who had ever married pull down the average for them. That is, the never married female to male wage ratio for this period of 51.3% was so low because the ever-married ratio of 41.7% pulled it down. Had no one been touched by the institution of marriage, and nothing else changed, the presumption is that the female-male wage ratio would have been 81.8% for this roughly decade long period.

171. Table One:
Annual Median Income, Entire Population

Year	Males\$	Females\$	Ratio
1997	25,936	14,281	55.1
1996	25,375	13,686	53.9
1995	24,774	13,233	53.4
1994	24,174	12,787	52.9
1993	24,097	12,645	52.5
1992	24,148	12,664	52.4
1991	24,847	12,756	51.3
1990	25,705	12,849	50.0
1989	26,613	12,978	48.8
1988	26,783	12,641	47.2
1987	26,416	12,331	46.7

Annual Median Income, Never Married

Year	Males\$	Females\$	Ratio
1997	15,076	12,208	81.0
1996	14,508	11,820	81.5
1995	14,201	11,523	81.1
1994	13,844	11,295	81.6
1993	13,572	11,040	81.3
1992	13,239	11,341	85.7
1991	13,765	11,732	85.2

These facts are certainly compatible with the marital asymmetry hypothesis that married, separated, divorced, or widowed females would earn far less than their male counterparts and that this effect would be much weaker for those who were never married. These facts are not at all consistent with the discrimination model, for here, the market, or capitalism, for some reason¹⁷³ gives *all* females the “short end of the stick.” If anything, the male chauvinist pig might, on this hypothesis, be presumed to have greater animus against unmarried females than married ones since his motto is that all women should be “barefoot, pregnant, and in the kitchen” and this ideal is more nearly approached by the latter than the former. Accordingly, we would expect that if sexism were a strong explanatory variable, the very opposite; namely, that those females who have never married would have lower wages relative to their male counterparts than would obtain in the case of those who have ever married. However, any such contention is flat out contradicted by the empirical evidence.

1990	14,382	12,052	83.8
1989	15,056	12,131	80.6
1988	15,206	11,855	78.0
1987	14,520	11,614	80.0

Annual Median Income, Ever Married

Year	Males\$	Females\$	Ratio
1997	31,517	14,833	47.1
1996	31,140	14,187	45.6
1995	30,648	13,327	43.5
1994	29,845	12,746	42.7
1993	29,584	12,709	43.0
1992	29,942	12,632	42.2
1991	30,474	12,488	41.0
1990	31,296	12,501	39.9
1989	32,281	12,497	38.7
1988	32,285	12,486	37.7
1987	31,949	11,792	36.9

This table is based on one of the author’s calculations, using the following source: U.S. CENSUS BUREAU, *Historical Income Tables – People*, table P-11, Marital Status -- People [Eighteen] Years Old and Over by Median Income and Gender: 1974 to 1997, at <http://www.census.gov/hhes/income/histinc/pl1.html> (last visited November 2, 1999) (on file with Oklahoma City University Law Review) [hereinafter *Income Tables*].

172. *Id.*

173. Presumably this is due to sheer nastiness and perversity.

Table two¹⁷⁴ tells much the same marital asymmetry story as does table one, only in a different and complementary manner.¹⁷⁵ The reason that the female to male median income ratio is so high for those aged fifteen to twenty-four is because relatively few people in this age cohort are married. This ratio tends to decline as we move up the age ranges because more and more people have ever been married (this includes the separated, divorced, married, and widowed) as they become older. The facts are perfectly congruent with the marital asymmetry hypothesis of the wage gap but not at all with the discrimination hypothesis. Again, posit malevolent male chauvinist pigs who are in a position to impose their will on society, wage wise; they hate females with a passion and wish above all else to do them ill in this regard. Why would they be so *variable* in their detestation? Why not penalize all women *equally* for the “crime” of being female? Why pass over young women or women who have never married? The facts of the matter simply make no sense when perused through these particular eye-glasses.

Economic theory is universal; it applies to all epochs as well as to all geographical areas and political jurisdictions. Let us, then, range more widely and peruse the evidence supplied by a different country, Canada, going back over several decades. We shall consider female/male wage ratios based on income averages, or means, not medians, as been shown so far. According to one report, the female/male earnings ratio in Canada in 1971 for those never married was 99.2%; for those ever married, it was 33.2%; and for both, together, it was 37.4%.¹⁷⁶ According to another report, the never married female to male average

174. Table Two:
Age Group Ratio (Female/Male Median Income)

Total	53.87
15-24 yrs	84.50
25-34 yrs	65.07
35-44 yrs	57.35
45-54 yrs	52.57
55-65 yrs	45.10
65 +	57.70

This table is also based on one of the author’s calculations. The sources for table two are the U.S. CENSUS BUREAU, *Money Incomes of Persons – Selected Characteristics, by Income Level: 1995*, in STATISTICAL ABSTRACT OF THE UNITED STATES, 1998: THE NATIONAL DATA BOOK 475 (118th ed. 1998) and *Income Tables*, *supra* note 171.

175. *Id.*

176. Block, *Unforeseen Consequences*, *supra* note 162, at 112.

annual earnings for full time workers in Canada with a university degree was 109.8% in 1971;¹⁷⁷ that is, females actually earned almost 10% more than their male counterparts.¹⁷⁸ In very sharp contrast, the equivalent figure for ever marrieds with these qualifications was 56.8%¹⁷⁹ and for the entire sample 61.2%.¹⁸⁰ And in 1982, Canadian women with these educational attainments who were never married earned 91.3% of their male counterparts,¹⁸¹ while their ever married sisters registered only 64.4% in this regard.¹⁸² The ratio for the entire sample was 67.2%.¹⁸³

VII. CONCLUSION

In the free society, James Dale would no more be free to impose his presence upon the unwilling Boy Scouts than an avowed and militant heterosexual would be able to join the Rutgers University Lesbian/Gay Alliance; or that the Black Muslim organization would be forced to accept a white person as a member; or that a religious affiliated university would be compelled to allow an atheistic professor to join its theology faculty. Freedom of association is a necessary condition of a civilized order; laws prohibiting discrimination violate this freedom and must be repealed. All of them.

177. BLOCK & WALKER, *supra* note 162, at 51.

178. *Id.*

179. *Id.* at 50.

180. *Id.* at 48.

181. *Id.* at 51.

182. *Id.* at 50.

183. *Id.* at 48.