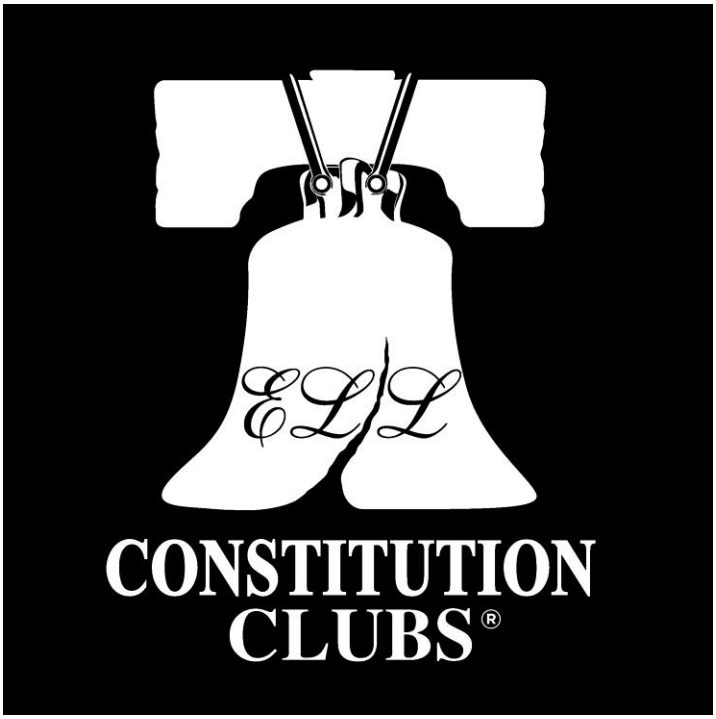

BOY SCOUTS OF AMERICA v. DALE

SUPREME COURT OF THE UNITED STATES
530 U.S. 640
June 28, 2000
[5 – 4]

OPINION: Chief Justice Rehnquist…James Dale entered scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of **assistant scoutmaster** of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that **he is gay**. He quickly became involved with, and eventually became the co-president of, the Rutgers University **Lesbian/Gay Alliance**. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the co-president of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's

decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals."

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. **New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation.**

The [trial court]…held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law…The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The appellate court…reversed and…held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division…[T]he court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights **"to enter into and maintain - intimate or private relationships - and to associate for the purpose of engaging in protected speech."** With respect to the right to intimate association, the court concluded that the Boy Scouts' "large size, non-selectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." With respect to the right of expressive association, the court "agreed that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." But the court concluded 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." Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way the Boy Scouts' existing members' ability to carry out their various purposes.'" The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society" and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. Finally, the court addressed the Boy Scouts' reliance on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995)[1] in support of its claimed First Amendment right to exclude Dale. The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel Boy Scouts to express any message."…

[1] Case 1A-A-3 on this website.

In *Roberts v. United States Jaycees* (1984)[2], we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. *Roberts* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.") Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "**freedom of association - plainly presupposes a freedom not to associate**."

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York* (1988). But the freedom of expressive association, like many freedoms, is **not absolute**. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private…

The Boy Scouts is a private, nonprofit organization. According to its mission statement:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:
>
> Scout Oath…
>
> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.
>
> Scout Law…

[2] Case 1A-A-1 on this website.

A Scout is: Trustworthy – Obedient – Loyal – Cheerful – Helpful – Thrifty – Friendly – Brave – Courteous – Clean – Kind - Reverent.

Thus, the **general mission** of the Boy Scouts is clear: "**To instill values in young people**." The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values-both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity…

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.'" **The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law**, particularly with the values represented by the terms "**morally straight**" and "**clean**."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "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.'" **The [New Jersey Supreme Court] concluded** that the **exclusion** of members like Dale "**appears antithetical to the organization's goals and philosophy**."

RWV! New Jersey: Who do you think you are, anyway? It would seem that the Boy Scouts would know what is antithetical to its own goals and philosophy much better than you. I am simply not a happy camper when judges exceed their power and try to parent. And, please understand, this issue is not about gender preference. It is about freedom. Freedom to assemble – freedom to associate. We explore the limits of that freedom. Those limits apply every bit as much to Gay and Lesbian Organizations who may not wish to have "anti-gay rights lobbyists" as members.

But our cases reject this sort of inquiry; **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**. See *Democratic Party of United States v. Wisconsin* (1981) ("As is true of all

expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas v. Review Bd. of Indiana Employment Security Div*. ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.")

The Boy Scouts asserts that it "teaches that homosexual conduct is not morally straight" and that it does "not want to promote homosexual conduct as a legitimate form of behavior." We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A **1978 position statement**…expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> "A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership."

Thus, at least as of 1978-the year James Dale entered Scouting-the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A **[1991] position statement…**(after Dale's membership was revoked but before this litigation was filed) also supports its current view:

> "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts."

…[A] **1993 position statement**, the most recent in the record, reads, in part:

> "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."

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed **in the early 1980's**, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today…**We cannot doubt that the Boy Scouts sincerely holds this view.**

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." As 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. See *La Follette* (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party.") That is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the co-president of a gay and lesbian organization at college and remains a gay rights activist. **Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior**.

Hurley is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted 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. We observed:

> "A contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, 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."

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." **As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.**

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

> "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from

disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

The Majority, in my opinion, gets this one right. The New Jersey Supreme Court apparently would push the "diversity" movement so hard that, eventually, none of us would have a unique voice. "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and, therefore, since that is not "the focus" of Scouting, they must admit avowed homosexuals as "leaders"? I repeat…my outrage for such an argument has nothing to do with those who profess to be and are homosexuals. There is far more at stake here than such a narrow question. This State Court run amok would force all private organizations to admit all whom they do not specifically gather to protest. How about a cross-dresser as a Scout leader simply because BSA does not meet to protest cross-dressing? Taken to its logical end, the Supreme Court would push "diversity" on us so much that eventually we all become of one mind with "no diversity." Food for thought, anyway.

Would New Jersey require the local Jewish Gardening Club to admit a Nazi on the basis that the Club does not meet for the purpose of fighting anti-Semitism but, instead, gardens? Preposterous. Furthermore, I doubt a Nazi group would appreciate Jewish members in their ranks. It works both ways. We are talking here about freedom to associate for all.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in Hurley was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues-a fact that the Boy Scouts disputes with contrary evidence-the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant. The presence of an avowed homosexual and gay rights activist 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. **The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its**

views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the **application** of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation-like inns and trains…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 be limited to," a list of over 50 types of places. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location.

Opposing views are welcome, but I must vent. What is happening to this Country? Look, I am a firm believer in the fact that the constitution's primary function is to protect minority positions. Otherwise, a majority vote in any legislative body on any topic, but for the limitations of the constitution, would prevail. However, with rulings and attitudes like the New Jersey Supreme Court, minorities would have the upper hand in literally every venue. Of course, their view did not win out here, albeit by only one vote. I have not yet looked at the dissent, but I am sure it will be a doozy!

As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express…We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley*, we said that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." But we went on to note that in that case "the Massachusetts public accommodations law has been applied in a peculiar way" because "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private

organizers would be shaped by all those protected by the law who wish to join in with some expressive demonstration of their own." And in the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn*., after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other…

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade…[to be] an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. **That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law**.

Justice Stevens' dissent makes much of its observation that the public perception of homosexuality in this country has changed. Indeed, it appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. See, e.g., *Texas v. Johnson*[3] (holding that Johnson's conviction for burning the American flag violates the First Amendment); *Brandenburg v. Ohio*[4] (holding that a Ku Klux Klan leaders' conviction for advocating unlawfulness as a means of political reform violates the First Amendment). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

Justice Stevens' extolling of Justice Brandeis' comments in *New State Ice Co. v. Liebmann* (1932) (dissenting opinion), confuses two entirely different principles. In *New State Ice*, the Court struck down an Oklahoma regulation prohibiting the manufacture, sale, and distribution of ice without a license. Justice Brandeis, a champion of state experimentation in the economic realm, dissented. But Justice Brandeis was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*[5]. He continued:

> "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form.

[3] Case 1A-S-37 on this website.
[4] Case 1A-S-17 on this website.
[5] Case 1A-S-4 on this website.

> Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*.

The judgment of the New Jersey Supreme Court is **reversed**…

DISSENT: Justice Stevens/Souter/Ginsburg/Breyer…Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with "things social" is directly applicable to this case:

> "…Denial of the right to experiment may be fraught with serious consequences to the Nation. 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. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann*…

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law does not "impose any serious burdens" on BSA's "collective effort on behalf of its shared goals," *Roberts v. United States Jaycees*, nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of the Boy Scouts.

James Dale joined BSA as a Cub Scout in 1978, when he was eight years old. Three years later he became a Boy Scout, and he remained a member until his 18th birthday. Along the way, he earned 25 merit badges, was admitted into the prestigious Order of the Arrow, and was awarded the rank of Eagle Scout-an honor given to only three percent of all Scouts. In 1989, BSA approved his application to be an Assistant Scoutmaster. On July 19, 1990, after more than 12 years of <u>active and honored participation</u>, the Boy Scouts sent Dale a letter advising him of the revocation of his membership.

Why do some justices insist on emphasizing the irrelevant? One would assume that Justice Stevens' position on gay inclusion in the Boy Scouts would be the same if Dale had been a "relatively inactive and low ranking" participant. Or, does he only favor gay **<u>Eagle</u>** Scouts?

The letter stated that membership in BSA "is a privilege" that may be denied "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." Expressing surprise at his sudden expulsion, Dale sent a letter requesting an explanation of the decision. In response, BSA sent him a second letter stating that the grounds for the decision "are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." At that time, no such standard had been **<u>publicly</u>** expressed by BSA.

And, why would it have to first be **<u>publicly</u>** expressed? Justice Stevens is for free speech/ association when the speech is pleasing to his ear and the association includes his friends. I find him to be dangerously inconsistent on most issues. Why, for example, would he not be "just as if not more" interested in the right of a **private** organization to stand for its own principles, its own freedom of expression?

There is absolutely nothing standing in the way (certainly not the Constitution) of the Dales of America from forming the Gay Scouts Club of America….nothing! If that seems cynical, choose your own generic title of an organization who teaches boys to camp, hike, etc., and who believes that the gay life style should not be frowned upon or discouraged as a moral life style…say, the Young Campers of America. Go ahead and form such a private organization. It's called freedom.

In this case, Boy Scouts of America contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention…requires us to look at what…values…BSA…teaches.

I can feel it coming on. I could be wrong, but my guess is that Justice Stevens is about to suggest that if the Boy Scouts do not make their **primary mission** that of preserving heterosexuality, they cannot prevail…which is utterly absurd. Let's see what he has to offer.

BSA's mission statement reads as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." Its federal charter declares its purpose is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916." BSA describes itself as having a "representative membership," which it defines as "boy membership that **reflects proportionately** the characteristics of the boy **population of its service area**."

For starters, Justice Stevens, this case is about adult leaders, not boy members. Second, assuming a certain % of the "boy population" to be juvenile delinquents, drug addicts or convicted felons, do you require them to be represented in this private organization? No, I do not put gays in such categories, but my point is twofold: (1) what constitutional right do you have, Justice Stevens, to decide the Boy Scouts' membership for them and (2) your logic is off the charts.

In particular, the group emphasizes that "neither 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."

To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets. For example, the Scout Law requires a member to promise, among other things, that he will be "obedient." Accompanying definitions for the terms found in the Oath and Law are provided in the Boy Scout Handbook and the Scoutmaster Handbook. For instance, the Boy Scout Handbook defines "obedient" as follows:

> "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 bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase "morally straight," which appears in the Oath ("On my honor I will do my best - To keep myself - **morally straight**"); the second term is the word "**clean**," which appears in a list of 12 characteristics together comprising the Scout Law.

The Boy Scout Handbook defines "morally straight," as such:

> "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant."

The Scoutmaster Handbook emphasizes these points about being "morally straight":

> "In any consideration of moral fitness, a key word has to be ‘courage.’ A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster."

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

> "A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.
>
> "You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.
>
> "There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> "Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults."

It is plain as the light of day that neither one of these principles-"morally straight" and "clean"-says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters.

No, and it doesn't say anything about cross-dressing, bestiality, the "swingers' lifestyle," incest, alcoholism or an Islamic extremist who preaches a philosophy of Jihad. Does that mean that all of the foregoing must be admitted into the Boy Scouts?

BSA's published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." To be sure, Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature, but Scoutmasters are, literally, the last person Scouts are encouraged to ask: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." Moreover, Scoutmasters are specifically directed to steer curious adolescents to other sources of information:

> "If Scouts ask for information regarding - sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional."

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

> "You may have boys asking you for information or advice about sexual matters.
>
> "How should you handle such matters?
>
> "Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this.
>
> "Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.
>
> "Rule number 3: You should refer boys with sexual problems to persons better qualified than you are to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck." Scoutmaster Handbook (1972).

In light of BSA's self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are concerned, BSA's bylaws state that it is "absolutely nonsectarian in its attitude toward - religious training." "The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders." In fact, many diverse religious organizations sponsor local Boy Scout troops. 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. This is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders (and Scoutmasters are told to refer Scouts to them); BSA surely is aware that some religions do not teach that homosexuality is wrong.

The Court seeks to fill the void by pointing to a statement of "policies and procedures relating to homosexuality and Scouting" signed by BSA's President and Chief Scout Executive in 1978 and addressed to the members of the Executive Committee of the national organization. The letter says that the BSA does "not believe that homosexuality and leadership in Scouting are appropriate." But when the entire 1978 letter is read, BSA's position is far more equivocal:

> "4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?
>
> "A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.
>
> "5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?
>
> "A. Yes, in the absence of any law to the contrary. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above. It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate."

What don't you understand about this picture, Justice Stevens? I emphasize that my message, here, should not be looked upon as "anti-gay." I am far more concerned that if the jurisprudence of Justice Stevens ever wins out, all of us of whatever beliefs or sexual orientation, will lose one of the most prized of all Constitutional freedoms --- the freedom to associate --- the freedom to assemble --- the freedom to be different.

…[A]t most this letter simply adopts an exclusionary membership policy. But simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim.

Second, the 1978 policy was never publicly expressed - unlike, for example, the Scout's duty to be "obedient." It was an internal memorandum, never circulated beyond the few members of BSA's Executive Committee. It remained, in effect, a **secret** Boy Scouts policy. Far from claiming any intent to express an idea that would be burdened by the presence of homosexuals, BSA's public posture - to the world and to the Scouts themselves - remained what it had always

been: one of tolerance, welcoming all classes of boys and young men. In this respect, BSA's claim is even weaker than those we have rejected in the past.

Justice Stevens is so off the charts that I could comment on every sentence. I don't have the energy.

Third, it is apparent that the draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be "obedient" and "obey the laws," even if "he thinks the laws are unfair" would prevail in such a contingency. In 1978, however, **BSA apparently did not consider it to be a serious possibility that a State might one day characterize the Scouts as a "place of public accommodation" with a duty to open its membership to all qualified individuals.**

Justice Stevens "apparently has not considered it to be a serious possibility that five out of nine of his associates might one day rule against a State who characterizes the Scouts as a place of public accommodation with a right to exclude Mr. Dale."

The portions of the statement dealing with membership simply assume that membership in the Scouts is a "privilege" that BSA is free to grant or to withhold. The statement does not address the question whether the publicly proclaimed duty to obey the law should prevail over the private discriminatory policy if, and when, a conflict between the two should arise - as it now has in New Jersey. At the very least, then, the statement reflects no unequivocal view on homosexuality. Indeed, **the statement suggests that an appropriate way for BSA to preserve its unpublished exclusionary policy would include an open and forthright attempt to seek an amendment of New Jersey's statute. ("If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.**")

Dale sued the Boy Scouts who then had two choices if they wished to exclude gay leaders. (1) It could challenge the New Jersey Supreme Court ruling in an "orderly manner" and, if it lost, (2) it could seek to change the New Jersey statute in an "orderly manner." They chose the former and won. What is it about the concept of losing that you don't get, Justice Stevens?

Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts. Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not "appropriate" appears entirely unconnected to, and is mentioned nowhere in, the myriad of **publicly** declared values and creeds of the BSA. That idea does not appear to be among any of the principles actually taught to Scouts. Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives that the organization wishes to exclude gays - and that wish has nothing to do with any expression BSA actually engages in.

The majority also relies on four other policy statements that were issued between 1991 and 1993. All of them were written and issued after BSA revoked Dale's membership. Accordingly, they

have little, if any, relevance to the legal question before this Court. In any event, they do not bolster BSA's claim.

In 1991, BSA issued two statements both stating: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." A third statement issued in 1992 was substantially the same. By 1993, however, the policy had changed:

> "BSA Position
>
> 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."

Aside from the fact that these statements were all issued after Dale's membership was revoked, there are four important points relevant to them. First, while the 1991 and 1992 statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort. Rather, BSA's 1993 homosexual exclusion policy was based on its view that including gays would be contrary to "the expectations that Scouting families have had for the organization." Instead of linking its policy to its central tenets or shared goals - to teach certain definitions of what it means to be "morally straight" and "clean" - BSA chose instead to justify its policy on the "expectation" that its members preferred to exclude homosexuals. The 1993 policy statement, in other words, was not based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past.

Second, even during the brief period in 1991 and 1992, when BSA tried to connect its exclusion of homosexuals to its definition of terms found in the Oath and Law, **there is no evidence that Scouts were actually taught anything about homosexuality's alleged inconsistency with those principles**.

Justice Stevens actually believes that before the adults of a private organization can exclude professed homosexuals as leaders (or any other person of any description, I guess), they must teach their reasons for doing so to children. This is nonsense of the highest order.

Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being "morally straight" and "clean." Neither BSA's mission statement nor its official membership policy was altered; no Boy Scout or Scoutmaster Handbook was amended to reflect the policy statement; no lessons were imparted to Scouts; no change was made to BSA's policy on limiting discussion of sexual matters; and no effort was made to restrict acceptable **religious affiliations** to those that condemn

homosexuality. In short, there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality.

There Justice Stevens goes again with the Kevin Bacon game --- remember the "commerce clause" arguments? If he can find **any** connection of a member to a group which is out of line with its teachings or policy, out goes their freedom of association. One could never form any type of exclusive organization with these rules. What happened to the freedom to assemble?

Third, BSA never took any clear and unequivocal position on homosexuality…

Fourth, at most the 1991 and 1992 statements declare only that BSA believed "homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed." But New Jersey's law prohibits discrimination on the basis of sexual orientation. And when Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct…

BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities is highly significant. By the time Dale was expelled from the Boy Scouts in 1990, BSA had already been engaged in several suits under a variety of state anti-discrimination public accommodation laws challenging various aspects of its membership policy. Indeed, BSA had filed amicus briefs before this Court in two earlier right to associate cases (*Roberts* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*) pointing to these very cases; it was clearly on notice by 1990 that it might well be subjected to state public accommodation anti-discrimination laws, and that a court might one day reject its claimed right to associate. Yet it took no steps prior to Dale's expulsion to clarify how its exclusivity was connected to its expression. It speaks volumes about the credibility of BSA's claim to a shared goal that homosexuality is incompatible with Scouting that since at least 1984 it had been aware of this issue-indeed, concerned enough to twice file amicus briefs before this Court - yet it did nothing in the intervening six years (or even in the years after Dale's expulsion) to explain clearly and **openly** why the presence of homosexuals would affect its expressive activities, or to make the view of "morally straight" and "clean" taken in its 1991 and 1992 policies a part of the values actually instilled in Scouts through the Handbook, lessons, or otherwise.

The Boy Scouts are not required to lobby or pursue a "cause" "openly." They are a private organization, entitled to the freedom that entails.

…[T]he right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Assn.*. For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations. In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's anti-discrimination law. To the contrary, we have squarely held that a State's anti-discrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy…

Several principles are made perfectly clear by *Jaycees* and *Rotary Club*. First, to prevail on a claim of expressive association in the face of a State's anti-discrimination law, it is not enough simply to engage in some kind of expressive activity. Both the Jaycees and the Rotary Club engaged in expressive activity protected by the First Amendment, yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the Jaycees and the Rotary Club did that as well. Third, it is not sufficient merely to articulate some connection between the group's expressive activities and its exclusionary policy. The Rotary Club, for example, justified its male-only membership policy by pointing to the "aspect of fellowship - that is enjoyed by the exclusively male membership" and by claiming that only with an exclusively male membership could it "operate effectively" in foreign countries. *Rotary Club*.

Rather, in *Jaycees*, we asked whether Minnesota's Human Rights Law requiring the admission of women "imposed any serious burdens" on the group's "collective effort on behalf of its shared goals." Notwithstanding the group's obvious publicly stated exclusionary policy, we did not view the inclusion of women as a "serious burden" on the Jaycees' ability to engage in the protected speech of its choice. Similarly, in *Rotary Club*, we asked whether California's law would "affect in any significant way the existing members' ability" to engage in their protected speech, or whether the law would require the clubs "to abandon their basic goals." See also *Hurley* ("A private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Assn.* (to prevail on a right to associate claim, the group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion")…The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law - and accompanying definitions - are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality. Moreover, there is simply no evidence that BSA otherwise teaches anything in this area, or that it instructs Scouts on matters involving homosexuality in ways not conveyed in the Boy Scout or Scoutmaster Handbooks. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all - let alone one that is significantly burdened by admitting homosexuals.

As in *Jaycees*, there is "no basis in the record for concluding that admission of homosexuals will impede the Boy Scouts' ability to engage in its protected activities or to disseminate its preferred views" and New Jersey's law "requires no change in BSA's creed." And like *Rotary Club*, New

Jersey's law "does not require BSA to abandon or alter any of" its activities. The evidence relied on by the Court is not to the contrary. The undisclosed 1978 policy certainly adds nothing to the actual views disseminated to the Scouts. It simply says that homosexuality is not "appropriate." There is no reason to give that policy statement more weight than Rotary International's assertion that all-male membership fosters the group's "fellowship" and was the only way it could "operate effectively." As for BSA's post-revocation statements, at most they simply adopt a policy of discrimination, which is no more dispositive than the openly discriminatory policies held insufficient in *Jaycees* and *Rotary Club*; there is no evidence here that BSA's policy was necessary to - or even a part of - BSA's expressive activities or was ever taught to Scouts.

I cannot believe the redundancy in this dissent.

Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being "morally straight" and "clean" is a far cry from the **clear, unequivocal statement necessary to prevail on its claim**. Despite the solitary sentences in the 1991 and 1992 policies, the group continued to disclaim any single religious or moral position as a general matter and actively eschewed teaching any lesson on sexuality. It also continued to define "morally straight" and "clean" in the Boy Scout and Scoutmaster Handbooks without any reference to homosexuality. As noted earlier, nothing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State's anti-discrimination law does not impose a "serious burden" or a "substantial restraint" upon the group's "shared goals" if the group itself is unable to identify its own stance with any clarity.

The majority…finds that BSA in fact "teaches that homosexual conduct is not morally straight." This conclusion, remarkably, rests entirely on statements in BSA's briefs. Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." So long as the record "contains written evidence" to support a group's bare assertion, "we need not inquire further." Once the organization "asserts" that it engages in particular expression, "we cannot doubt" the truth of that assertion.

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited," because "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." Brief for Petitioners ("The Constitution protects [BSA's] ability to control its own message").

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's anti-discrimination law. More

critically, that inquiry requires our independent analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's anti-discrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an anti-discrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court's prescription of total deference will not do…

There is, of course, a valid concern that a court's independent review may run the risk of paying too little heed to an organization's sincerely held views. But unless one is prepared to turn the right to associate into a free pass out of anti-discrimination laws, an independent inquiry is a necessity. Though the group must show that its expressive activities will be substantially burdened by the State's law, if that law truly has a significant effect on a group's speech, even the subtle speaker will be able to identify that impact.

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey's law.

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

In *West Virginia Bd. of Ed. v. Barnette*, we recognized that the government may not "require affirmation of a belief and an attitude of mind," nor "force an American citizen publicly to profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." “One important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.” *Hurley*. Though the majority

mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim. As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send.

In its briefs, BSA implies, even if it does not directly argue, that Dale would use his Scoutmaster position as a "bully pulpit" to convey immoral messages to his troop, and therefore his inclusion in the group would compel BSA to include a message it does not want to impart. Even though the majority does not endorse that argument, I think it is important to explain why it lacks merit, before considering the argument the majority does accept.

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. Accordingly, BSA's revocation could only have been based on an assumption that he would do so in the future. But the only information BSA had at the time it revoked Dale's membership was a newspaper article describing a seminar at Rutgers University on the topic of homosexual teenagers that Dale attended. The relevant passage reads:

> "James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.
>
> He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> 'I was looking for a role model, someone who was gay and accepting of me,' Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends."

Nothing in that article, however, even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs Dale, like all Scoutmasters, that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. Indeed, from all accounts Dale was a model Boy Scout and Assistant Scoutmaster up until the day his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA because of anything he said in the newspaper article.

To be sure, the article did say that Dale was co-president of the Lesbian/Gay Alliance at Rutgers University, and that group presumably engages in advocacy regarding homosexual issues. But surely many members of BSA engage in expressive activities outside of their troop, and surely BSA does not want all of that expression to be carried on inside the troop. For example, a Scoutmaster may be a member of a religious group that encourages its followers to convert others to its faith. Or a Scoutmaster may belong to a political party that encourages its members to advance its views among family and friends. Yet BSA does not think it is appropriate for Scoutmasters to proselytize a particular faith to unwilling Scouts or to attempt to convert them from one religion to another. Nor does BSA think it appropriate for Scouts or Scoutmasters to bring politics into the troop. From all accounts, then, BSA does not discourage or forbid outside

expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization. Of course, a disobedient member who flouts BSA's policy may be expelled. But there is no basis for BSA to presume that a homosexual will be unable to comply with BSA's policy not to discuss sexual matters any more than it would presume that politically or religiously active members could not resist the urge to proselytize or politicize during troop meetings. As BSA itself puts it, its rights are "not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law."

The majority, though, does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality - even if Dale has no intention of doing so. The majority holds that "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinct message," and, accordingly, BSA is entitled to exclude that message. In particular, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Brief for Petitioners ("By donning the uniform of an adult leader in Scouting, he would 'celebrate his identity' as an openly gay Scout leader")…

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.

It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as "speech" under the First Amendment. *United States v. O'Brien*. At the same time, however, "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities. That cannot be, and never has been, the law.

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. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. As counsel for the Boy Scouts remarked, Dale "put a banner around his neck when he got himself into the newspaper.

He created a reputation. He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself."

Another difference between this case and *Hurley* lies in the fact that *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern BSA's claim of a right of expressive association. Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission of some person as a member or at odds with the appointment of a person to a leadership position in the group.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA members. The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University. It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message - for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral- but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, religious minorities, or any other discrete group. Surely the organizations are not forced by anti-discrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.

The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as school teachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. Dozens of Scout units throughout the State are sponsored by public agencies, such as schools and fire departments, that employ such role models. BSA's affiliation with numerous public agencies that comply with New Jersey's law against discrimination cannot be understood to convey any particular message endorsing or condoning the activities of all these people.

This foolish thinking emasculates the 1st Amendment. No "association" could ever survive Justice Stevens' test.

Unfavorable opinions about homosexuals "have ancient roots." Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine…Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun's classic opinion in *Bowers*; Georgia's invalidation of the statute upheld in *Bowers*; and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

DISSENT: Justice Souter/Ginsburg/Breyer…Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. BSA has disclaimed any argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA.

The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message. As Justice Stevens explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any anti-discrimination law.

If, on the other hand, an expressive association claim has met the conditions Justice Stevens describes as necessary, there may well be circumstances in which the anti-discrimination law

must yield, as he says. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an anti-discrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.