

## RECENT DEVELOPMENTS

“HOW SOLEMN IS THE DUTY OF THE MIGHTY CHIEF”<sup>1</sup>:  
MEDIATING THE CONFLICT OF RIGHTS IN *Boy Scouts of  
America v. Dale*, 120 S. Ct. 2446 (2000)

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### I. INTRODUCTION

Since 1910, the Boy Scouts of America<sup>2</sup> has provided what it describes as an educational program for boys and young men

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1. Line from ceremonial closing used by the “Order of the Arrow,” a society of honor campers within the Boy Scouts of America.

2. Throughout this Note, the terms “Boy Scouts of America,” “Boy Scouts,” “BSA,” and “Scouting” are used interchangeably.

to build character, to train in the responsibilities of participatory citizenship, and to develop personal fitness.<sup>3</sup> For much of its ninety-year history, Scouting has been seen as the "embodiment of liberalism," exemplifying values such as "the belief in merit, autonomy, equal treatment, patriotism, community, [and] child development."<sup>4</sup> More recently, however, many of Scouting's values and views have come into question as "bigoted, outmoded boilerplate."<sup>5</sup> As society's mores have shifted away from a "Norman Rockwell" depiction of America, the Boy Scouts has found itself defending lawsuits against some of those they have denied admission.<sup>6</sup> The plaintiffs in these cases maintain that the Boy Scouts of America constitutes a place of public accommodation under state or federal law,<sup>7</sup> and that their denial of admission is unlawful discrimination.<sup>8</sup> Until 1998, the Boy Scouts successfully argued that Scouting was not covered by those statutes or that it fell within a statutory exception, thus avoiding federal constitutional questions.<sup>9</sup> However, when the Boy Scouts faced litigation under New Jersey's broad public accommodations statute,<sup>10</sup> it brought the Scouts' constitutional

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3. See generally THE BOY SCOUT HANDBOOK ch. 1 (11th ed. 1998).

4. William A. Donohue, *Culture Wars Against the Boy Scouts*, SOCIETY, May 1, 1994, at 59, available at 1994 WL 13568773.

5. *Id.* (quoting a plaintiff in *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993)).

6. See, e.g., *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993), cert. denied, 510 U.S. 1012 (1993) (denying admission to a boy who was unwilling to subscribe to a duty to God); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998) (denying admission to an avowed homosexual).

7. E.g., 42 U.S.C. § 2000a (1994); CAL. CIV. CODE § 51 (West Supp. 1999) ("Unruh Civil Rights Act"); N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (West Supp. 2000) ("Law Against Discrimination").

8. See *Welsh*, 993 F.2d at 1268; *Curran*, 952 P.2d at 219.

9. Four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have ruled that the Boy Scouts of America is not a place of public accommodation. See *Welsh*, 993 F.2d at 1278 ("Even if we were to agree for the purpose of argument that the Boy Scouts is a public accommodation, Congress expressly excluded private clubs such as the Scouts from the operation of the statute."); *Curran*, 952 P.2d at 239 ("[W]e conclude that the existing language of the Unruh Civil Rights Act . . . cannot reasonably be interpreted to bring the membership decisions of the Boy Scouts within the reach of the Act."); *Quinnipiac Council, Boy Scouts of America v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995); *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976).

10. See *Boy Scouts of America v. Dale*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

rights of speech and free association directly into conflict with the State's compelling interest in eliminating discrimination.<sup>11</sup>

Last Term, in *Boy Scouts of America v. Dale*,<sup>12</sup> the Supreme Court resolved this conflict, holding that requiring the Boy Scouts to admit an avowed homosexual into adult membership violates the Scouts' First Amendment right of expressive association. As the author of the opinion, Chief Justice Rehnquist had the weighty responsibility of mediating the conflicting interests of organizations like the Boy Scouts and excluded individuals such as James Dale, as well as state interests all entangled in public accommodations laws. The Court found that the application of New Jersey's Law Against Discrimination (LAD)<sup>13</sup> to the Boy Scouts in this case "would significantly burden the [Boy Scouts'] right to oppose or disfavor homosexual conduct."<sup>14</sup>

Although the Court was correct in determining that "the First Amendment prohibits the State from imposing" such a "severe intrusion on the Boy Scouts' rights to freedom of expressive association,"<sup>15</sup> the Court should have also considered the case directly under the Free Speech Clause of the First Amendment and the seldom-discussed freedom of intimate association.<sup>16</sup> *Boy Scouts* thus provided an opportunity not only to delineate the meaning of the right of intimate association, but also to forge greater consensus generally on the protections afforded by the freedoms of speech and association.

Part II of this Comment details the factual and procedural history leading up to the Court's decision as well as the majority and dissenting opinions in *Boy Scouts*. Part III.A examines the Boy Scouts' claim to a right of expressive association and in particular focuses on the dissent's argument that BSA is agnostic on issues of sexuality. Part III.B discusses the Scouts' free speech claim, which is analogous to the

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11. See *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (noting the conflict).

12. 120 S. Ct. 2446 (2000).

13. N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (West 2000).

14. *Boy Scouts*, 120 S. Ct. at 2457.

15. *Id.*

16. See *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (recognizing that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights" and is not limited to "relationships among family members").

expressive association argument. Part III.C explores the application of the doctrine of intimate association to the Boy Scouts. In concluding, Part IV considers the implications of an opposite outcome in *Boy Scouts* for religious organizations.

## II. FACTS AND PROCEDURAL HISTORY

### *A. The Boy Scouts of America*

The Boy Scouts of America is a "private, not-for-profit organization engaged in instilling its system of values in young people"<sup>17</sup> and "prepar[ing] them to make ethical choices over their lifetime in achieving their full potential."<sup>18</sup> BSA describes itself as a "values-based program with its own code of conduct."<sup>19</sup> This code of conduct is found in the Scout Oath and Law, by which Boy Scouts of all ages—youth and adult leaders—are expected to live:<sup>20</sup>

#### *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*

A Scout is trustworthy, loyal,  
helpful, friendly, courteous, kind,  
obedient, cheerful, thrifty, brave,  
clean, and reverent.<sup>21</sup>

Many Scouting activities involve exploring and appreciating

17. *Boy Scouts*, 120 S. Ct. at 2449.

18. *Id.* at 2451.

19. THE SCOUTMASTER HANDBOOK 10 (1998).

20. See THE BOY SCOUT HANDBOOK 45 (11th ed. 1998).

21. *Id.* at 9. The Scout Oath and Law are taken from the most recent edition of *The Boy Scout Handbook*; however, they remain unchanged since the first edition of the *Handbook* was published in 1911. See *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1276 (7th Cir. 1993).

the outdoors, “[b]ut Scouting is far more than fun in the outdoors, hiking, and camping. Scouting is a way of life. Scouting is growing into responsible manhood, learning to be of service to others.”<sup>22</sup> Thus, although Scouting “focuses on camping and outdoor skills, this is the means to an end.”<sup>23</sup> “As stated by Scouting’s founder, Robert S.S. Baden Powell: ‘Don’t let the technical outweigh the moral. Field efficiency, backwoodsmanship, camping, hiking, good turns, jamborees, comradeship, are all means, not the end. The end is character. Character with a purpose.’”<sup>24</sup> In short, the “several functions and missions of the BSA are important and vital to the whole: there is a religious component, a teaching component and a strong overall emphasis in shaping the moral character of young boys.”<sup>25</sup>

“Boy Scouting takes place primarily in Troops, small units typically consisting of 15 to 30 boys led by a uniformed Scoutmaster and Assistant Scoutmasters,”<sup>26</sup> and patrols of six to eight boys.<sup>27</sup> Parents play an active role in their sons’ participation in Scouting.<sup>28</sup> Nearly sixty-five percent of Boy Scouts troops are sponsored by synagogues and churches.<sup>29</sup> Scouting is an “integral part of many church youth programs.”<sup>30</sup> Before a boy can become a Scout, he must satisfy his Scoutmaster that he “[u]nderstand[s] and intend[s] to live by the Scout Oath or Promise, the Scout Law, the Scout motto, and the Scout slogan.”<sup>31</sup> Scout leaders likewise must “[a]gree to live by the Scout Oath and Law” before they can serve, and they are expected to set “an example for themselves and for

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22. THE OFFICIAL BOY SCOUT HANDBOOK 9 (9th ed. 1979) (1985 prtg.).

23. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 225 (Cal. 1998) (quoting the trial court).

24. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580, 584 (Cal. App. 1994), *opinion superseded by* 874 P.2d 901 (Cal. 1994), *opinion vacated, judgment aff’d*, 952 P.2d 218 (Cal. 1998).

25. Brief for Amici Curiae, John J. Hurley and the South Boston Allied War Veterans Council at \*2-3, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228506 [hereinafter Brief for Allied War Veterans Council].

26. Brief for Petitioners at \*3, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228616 [hereinafter Brief for Petitioners].

27. *See* THE OFFICIAL BOY SCOUT HANDBOOK 12 (9th ed. 1979) (1985 prtg.).

28. *See id.* at 428; TROOP COMMITTEE GUIDEBOOK 18, 37 (1990).

29. *See* Brief for Petitioners, *supra* note 26, at \*3.

30. *Id.*

31. THE OFFICIAL BOY SCOUT HANDBOOK 11 (9th ed. 1979) (1985 prtg.).

others by living the Scout Oath and Law to the best of their abilities."<sup>32</sup>

Because much BSA activity is instructional in nature, the Scoutmaster serves as a teacher and role model to the boys in his troop. *The Scoutmaster Handbook* advises the potential leader that "[t]he Scouts in your troop will look up to you for guidance on a number of levels, many of them unspoken. The way you treat others, provide leadership, and act during meetings and on Scout outings will influence Scouts' actions."<sup>33</sup> Although his mentoring duties are most often executed in other areas of Scouting, the Scout leader's teaching and role model responsibilities occasionally extend to the arena of sexuality. BSA instructs its leaders in such circumstances to promote a message of sexual abstinence until marriage, in accordance with the "morally straight" provision of the Scout Oath.<sup>34</sup> When further questions arise, leaders are instructed to "answer them as honestly as [they] can and, whenever it is appropriate, [to] encourage [the Scout] to share his concerns with his parents or guardian, spiritual leader, or a medical expert."<sup>35</sup>

BSA maintains 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.'"<sup>36</sup> "We believe an avowed homosexual is not a role model for the values espoused in the Scout Oath and Law."<sup>37</sup> The Boy Scouts has promulgated several "position statement[s]" to that effect.<sup>38</sup> The operation of this position is borne out by BSA's decision to sever its relationship with avowed homosexuals.<sup>39</sup>

### B. James Dale

As a youth, James Dale rose through the Scouting program

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32. THE SCOUTMASTER HANDBOOK 3, 6 (1998).

33. *Id.* at 3.

34. *See id.* at 132.

35. *Id.*

36. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2452 (2000).

37. *Boy Scouts of America*, Press Release, *Boy Scouts of America Sustained By United States Supreme Court* (June 28, 2000), available at <http://bsa.scouting.org/press/000628/index.html>.

38. *Boy Scouts*, 120 S. Ct. at 2453.

39. *See id.*

first as a Cub Scout and later as a Boy Scout.<sup>40</sup> Scouting provided Dale with “a sense of civic and ethical responsibility, fostered his self-confidence, and gave him the opportunity to have fun and form friendships with other boys in his community.”<sup>41</sup> “By all accounts, Dale was an exemplary Scout.”<sup>42</sup> While a Scout, Dale earned twenty-five merit badges, was elected into the Order of the Arrow—Scouting’s society of honor campers—and was ultimately awarded Scouting’s highest honor, the rank of Eagle Scout.<sup>43</sup> After he aged out of the youth program in 1989, the Boy Scouts approved Dale’s application to be an Assistant Scoutmaster in Troop 73 of Monmouth Council.<sup>44</sup>

Dale’s tenure as an Assistant Scoutmaster was cut short after just sixteen months.<sup>45</sup> Around the same time that he became an Assistant Scoutmaster, Dale left home to attend Rutgers University.<sup>46</sup> While attending college Dale “first acknowledged to himself and others that he is gay.”<sup>47</sup> Dale quickly became involved with and rose to become the co-president of the Rutgers University Lesbian/Gay Alliance in 1990.<sup>48</sup> In his capacity as co-president, Dale attended a seminar “addressing the psychological and health needs of lesbian and gay teenagers” and was interviewed “about his advocacy of homosexual teenagers’ need for gay role models” by a local newspaper.<sup>49</sup> An article entitled “Seminar addresses needs of homosexual teens” and featuring a picture of James Dale appeared in the July 8, 1990 edition of the Newark Star-Ledger.<sup>50</sup> Subsequently BSA removed Dale from its adult membership and stripped him of his Assistant Scoutmaster

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40. *See id.* at 2449.

41. Brief for Respondent, James Dale at \*6, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at 2000 WL 340276 [hereinafter Brief for Respondent].

42. *Boy Scouts*, 120 S. Ct. at 2449.

43. *See id.* at 2460 (Stevens, J., dissenting).

44. *See id.*

45. *See id.* at 2449.

46. *See id.*

47. *Id.*

48. *See id.*

49. *Id.*

50. *See* Brief for Respondent, *supra* note 41, at \*6 (citing Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark, N.J.), July 8, 1990).

position.<sup>51</sup> Claiming that the Boy Scouts "violated New Jersey's public accommodations statute and its common law by revoking [his] membership based solely on his sexual orientation," Dale filed suit in New Jersey Superior Court.<sup>52</sup>

### C. Procedural History in the New Jersey Courts

The New Jersey Superior Court, Chancery Division, granted summary judgment in favor of the Boy Scouts, holding that BSA is not a place of public accommodation.<sup>53</sup> The court alternatively concluded that as a "distinctly private group," BSA is exempt from the New Jersey public accommodations law. The court suggested that forcing the Scouts to accept Dale as an adult leader would violate the Scouts' First Amendment freedom to associate.<sup>54</sup>

The Appellate Division reversed.<sup>55</sup> It held that the Boy Scouts of America is a place of public accommodation under the Law Against Discrimination.<sup>56</sup> Further, it rejected the Boy Scouts' federal constitutional claims because "[Dale] is not asserting a right under the LAD to alter the content of the BSA's viewpoint."<sup>57</sup>

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51. See *Boy Scouts*, 120 S. Ct. at 2449.

52. *Id.*

53. See *id.*; Dale v. Boy Scouts of America, No. MON-C-330-92, slip op. at 50, 71 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995). The New Jersey Superior Court also rejected Dale's common-law claim, concluding that "New Jersey's policy is embodied in the public accommodations law." *Boy Scouts*, 120 S. Ct. at 2450.

54. See Dale v. Boy Scouts of America, No. MON-C-330-92, slip op. at 71 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995).

55. See Dale v. Boy Scouts of America, 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998). The Appellate Division affirmed the dismissal of Dale's common law claims. See *id.*

56. See *id.* at 280-83.

57. *Id.* at 293. Judge Landau, concurring and dissenting in part, distinguished between expelling Dale from leadership in the Scouts and membership. "These facts require us to address two separate issues, restriction of membership and restriction of leadership." *Id.* at 294. He concluded that "[w]hen we force the Boy Scouts to permit [Dale] to serve as a volunteer leader, we force them equally to endorse his symbolic, if not openly articulated, message. I believe that this violates the right of expressive association guaranteed by the First Amendment of the United States Constitution." *Id.* at 295. However, he "concur[red] with the majority result, to the extent that it would require [Dale to] be restored to membership." *Id.* What Judge Landau failed to appreciate is that there is no such thing as "adult membership" within Boy Scouting. To be a "member," adults must serve in a leadership position. See, e.g., Boy Scouts of America Adult Application, Form No. 28-5011; see also Brief for Respondent, *supra* note 41, at \*3 (noting that all "BSA adult members are automatically 'leaders'").

The New Jersey Supreme Court unanimously affirmed.<sup>58</sup> It held that the Boy Scouts of America is a place of public accommodation and is not exempt under any of the statutory exceptions to the Law Against Discrimination.<sup>59</sup> In determining that BSA is a place of public accommodation under New Jersey law, the court found it dispositive that BSA is large and that it engages in broad public solicitation for members, advertises for members, received a federal charter, maintains relationships with the federal and local governments, and partners with public schools.<sup>60</sup> In rejecting the Boy Scouts' claim that it is "distinctly private" and thus exempt from the LAD, the court dismissed the argument that the Scout Oath and Law operate as genuinely selectivity criteria.<sup>61</sup> The court also rejected arguments that BSA is engaged in religious education or exercising parent-like control.<sup>62</sup>

After addressing the state law issues, the New Jersey Supreme Court ruled that applying the LAD to the Scouts in this case did not violate their federal constitutional rights "to enter into and maintain . . . intimate or private relationships . . . . [and] to associate for the purpose of engaging in protected speech."<sup>63</sup> After considering the Boy Scouts' large size and non-selectivity, the court concluded that "[r]elationships within the [Boy Scout] troop are simply not the 'kind of . . . personal relationship[s] . . . accorded protection' under the First Amendment."<sup>64</sup> Second, the court rejected the Scouts' expressive association claim, asserting that "[w]e are satisfied that Boy Scouts' expulsion of Dale is based on little more than prejudice and not on a unified Boy Scout position."<sup>65</sup> Finally, satisfied that "the reinstatement of Dale does not compel Boy Scouts to express any message," the court dispensed with the

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58. See *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1230 (N.J. 1999).

59. See *id.* at 1213-18.

60. See *id.* at 1210-13.

61. See *id.* at 1216-17. In contrast, the Seventh Circuit held that the "Scouts organization not only is selective, but that its very Constitution, By-laws and doctrine dictate that it remain selective." *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir. 1993). As evidence of Scouting's selectivity, the Seventh Circuit pointed to the Scout Oath and Law. See *id.*

62. See *Dale*, 734 A.2d at 1217-18.

63. *Id.* at 1219 (quoting *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987)).

64. *Id.* at 1221 (quoting *Rotary Club*, 481 U.S. at 547).

65. *Id.* at 1226.

Scouts' freedom of speech argument.<sup>66</sup>

*D. United States Supreme Court*

The United States Supreme Court reversed.<sup>67</sup> Writing for the Court, Chief Justice Rehnquist concluded that "applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association."<sup>68</sup> The Court first noted that the right to associate with others in pursuit of "political, social, economic, educational, religious, and cultural ends" is crucial to protecting unpopular ideas.<sup>69</sup> The Court also recognized that "[f]orcing 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."<sup>70</sup> However, the Court cautioned that "the freedom of expressive association, like many freedoms, is not absolute," and "could be overridden 'by regulations adopted to serve compelling state interests.'"<sup>71</sup> The Chief Justice then proceeded to analyze whether Boy Scouting is protected by the First Amendment's expressive associational right, noting that such protection "is not reserved for advocacy groups."<sup>72</sup>

After examining the Boy Scouts' "general mission" of instilling the "values [of the Scout Oath and Law] in young people" and the role of Scoutmasters in "inculcat[ing boys] with the Boy Scouts' values," the Court readily concluded that it was "indisputable that an association that seeks to transmit such a system of values engages in expressive activity."<sup>73</sup> The Court next considered whether the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate "public or private viewpoints" on homosexuality.<sup>74</sup> While finding it "[o]bvious[]" that the Scout Oath and Law "do not expressly mention sexuality or sexual orientation," the Chief Justice "accept[ed] the Boy Scouts' assertion" that it teaches

66. *Id.* at 1229.

67. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2458 (2000). Justices O'Connor, Scalia, Kennedy, and Thomas joined the Chief Justice's opinion.

68. *Id.* at 2449.

69. *Id.* at 2451.

70. *Id.*

71. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

72. *Id.*

73. *Id.* at 2452.

74. *Id.*

homosexual conduct is not “morally straight.”<sup>75</sup> He noted that the Court looks only to the “question of sincerity of the professed beliefs” and that “it is not the role of the courts to reject a groups’ expressed values because they disagree with those values or find them internally inconsistent.”<sup>76</sup> Given BSA’s position statements with regard to homosexuality and Scouting, as well as the Boy Scouts’ consistent assertion of “the same position with respect to homosexuality that it asserts today” in litigation through the 1980s and 90s, the Chief Justice concluded, “[w]e cannot doubt that the Boy Scouts sincerely holds this view.”<sup>77</sup> Finally, the Court held that “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,”<sup>78</sup> and that this would “significantly burden the organization’s right to oppose or disfavor homosexual conduct” in violation of the First Amendment.<sup>79</sup> In so holding, the Chief Justice rejected an argument that Boy Scouts must associate for the purpose of disseminating a message about homosexuality to be protected by the First Amendment in this context.<sup>80</sup> It was enough that they “merely engage in expressive activity that could be impaired in order to be entitled to protection.”<sup>81</sup>

The Court did not deny New Jersey’s compelling interest in eliminating discrimination. Rather, the Chief Justice noted that in all association 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.”<sup>82</sup> The Court held that in this case, as in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>83</sup> “[t]he state interests embodied in New Jersey’s

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75. *Id.* at 2452-53.

76. *Id.*

77. *Id.* at 2453.

78. *Id.* at 2454.

79. *Id.* at 2457.

80. *See id.* at 2454.

81. *Id.*

82. *Id.* at 2456.

83. 515 U.S. 557 (1995) (Souter, J., writing for a unanimous Court) (holding that a state court’s application of a state public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey violates the First Amendment). *Hurley* involved a claim of freedom of speech rather than expressive association.

public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>84</sup>

Justice Stevens dissented.<sup>85</sup> He concluded that New Jersey's public accommodations law "does not 'impos[e] any serious burdens' on BSA's 'collective effort on behalf of [its] shared goals,' nor does it force BSA to communicate any message that it does not wish to endorse."<sup>86</sup> Accordingly, New Jersey's law "abridges no constitutional right of the Boy Scouts."<sup>87</sup> Justice Stevens surveyed the Boy Scouts' mission statement, its claims of inclusivity, and the Scout Oath and Law's terms as defined in the Boy Scout and Scoutmaster handbooks.<sup>88</sup> He opined that "[i]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality" and that the Scout Oath and Law and BSA's published guidance fail to "express[] any position whatsoever on sexual matters."<sup>89</sup> He discounted the Boy Scout policy statements on homosexuality as merely "adopt[ing] an exclusionary membership policy," litigation-driven, and inconsistent in their reasoning.<sup>90</sup> Further, he suggested that "BSA never took any clear and unequivocal position on homosexuality,"<sup>91</sup> and to the extent it did take a position it was not "part of the values actually instilled in Scouts through the *Handbook*, lessons, or otherwise."<sup>92</sup>

This "inability to make its position clear and . . . failure to connect its alleged policy to its expressive activities" was "highly significant" to the dissenting Justices.<sup>93</sup> Justice Stevens reviewed the Court's associational freedom cases and noted that "until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a

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84. *Boy Scouts*, 120 S. Ct. at 2457.

85. *See id.* at 2459 (Stevens, J., dissenting). Justices Souter, Ginsburg, and Breyer joined the dissent.

86. *Id.* at 2459-60 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984)).

87. *Id.* at 2460.

88. *See id.* at 2460-62.

89. *Id.* at 2461.

90. *Id.* at 2463-65.

91. *Id.* at 2465.

92. *Id.* at 2466.

93. *Id.*

State's antidiscrimination law."<sup>94</sup> To prevail on an expressive association claim, Justice Stevens suggested that 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 [trait]."<sup>95</sup> Under his approach, "it is not enough simply to engage in *some kind of* expressive activity."<sup>96</sup> He found that the 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."<sup>97</sup> Justice Stevens suggested that "BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality."<sup>98</sup> After comparing the Boy Scouts' approach to homosexuality to the exclusionary policies toward women rejected in *Roberts v. United States Jaycees*<sup>99</sup> and *Board of Directors of Rotary International v. Rotary Club of Duarte*,<sup>100</sup> Justice Stevens concluded that BSA would not be "burdened, affected, or restrained by including homosexuals."<sup>101</sup>

In a single footnote, Justice Stevens summarily rejected the Boy Scouts' claim of protection under freedom of intimate association.<sup>102</sup> "Considering BSA's size[,] its broad purposes and its nonselectivity[,] it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives."<sup>103</sup>

The dissent also rejected the argument that Dale's admission

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94. *Id.* at 2467.

95. *Id.* at 2469 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988)).

96. *Id.* (emphasis in original).

97. *Id.* at 2470.

98. *Id.*

99. 468 U.S. 609 (1984) (holding a state court's application of a state public accommodations law to require admission of women to a large business-oriented organization did not violate the male members' freedom of intimate or expressive association).

100. 481 U.S. 537 (1987).

101. *Boy Scouts*, 120 S. Ct. at 2469-70 (Stevens, J., dissenting).

102. *See id.* at 2477 n.26.

103. *Id.* (citing *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987)).

would compel an undesired message, as in *Hurley*.<sup>104</sup> Justice Stevens conceded that “participating in the Scouts could itself conceivably send a message on some level, [however,] it is not the kind of act that we have recognized as speech.”<sup>105</sup> Although “an Olympic gold medal winner or a Wimbledon tennis champion[] being ‘openly gay’ perhaps communicates a message,”<sup>106</sup> Justice Stevens claimed that it is “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.”<sup>107</sup> Here the dissent emphasized the sheer size of the Boy Scouts of America as a national organization.<sup>108</sup>

According to Justice Stevens, at the time of Dale’s expulsion there was nothing “even remotely suggest[ing] that Dale would advocate any views on homosexuality to his troop.”<sup>109</sup> The dissent recognized that the Lesbian/Gay Alliance, for which Dale served as co-president, “presumably engages in advocacy regarding homosexual issues” but concluded that surely BSA does not exclude members because of their advocacy outside the Scout troop that BSA would not permit within the troop setting.<sup>110</sup> As examples to support this proposition Justice Stevens cited matters of faith and politics.<sup>111</sup>

According to Justice Stevens, the “only apparent explanation for the majority’s holding . . . 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.”<sup>112</sup> Thus, the dissent criticized the Court as treating the “openly gay male[s] . . . openness [as] the sole and sufficient justification for his ostracism.”<sup>113</sup>

Justice Souter authored a brief dissent joined only by Justices

104. *See id.* at 2472-77.

105. *Id.* at 2476.

106. *Id.* at 2477.

107. *Id.*

108. *See id.* at 2476.

109. *Id.* at 2473.

110. *See id.* at 2473-74.

111. *See id.* at 2473.

112. *Id.* at 2476.

113. *Id.*

Ginsburg and Breyer.<sup>114</sup> He concluded that "BSA has not made out an expressive association claim[,] 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."<sup>115</sup> However, Justice Souter suggested that it is "certainly possible for an individual to become so identified with a position as to epitomize it publicly" and if that individual's position were at odds with a group's advocated position then applying an anti-discrimination statute to require that individual's acceptance in a leadership position might violate the group's right of expressive association.<sup>116</sup>

### III. ANALYSIS

The Boy Scouts argued that requiring it to admit an avowed homosexual violates its freedoms of speech, expressive association, and intimate association.<sup>117</sup> As the Court and the dissent largely focused on the right of expressive association, that is the proper place to begin. Much of the disagreement between the Court and the dissent turns on how BSA is characterized and what message, if any, it is understood to convey on sexual morality. However, inherent in the notion of expressive association is the analytically distinct right of the group freely to express its own beliefs or ideals, regardless of the popularity of those ideals.<sup>118</sup> Whether the Boy Scouts of America even has a message about sexual morality, much less one with which Dale's admission would interfere, should also be examined directly under the Free Speech Clause of the First Amendment. Finally, the Boy Scouts arguably possesses attributes of "certain intimate or private relationships" that the Supreme Court has described as "protected by the Bill of Rights."<sup>119</sup> BSA's right of intimate association must be explored in detail and not dismissed in a single footnote. In sum, the

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114. *Id.* at 2478 (Souter, J., dissenting).

115. *Id.* at 2479.

116. *Id.*

117. See Brief for Petitioners, *supra* note 26, at \*7-19.

118. See *Palko v. Connecticut*, 302 U.S. 319 (1937). The *Palko* Court described this right as essential to "nearly every other form of freedom." *Id.* at 327.

119. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

Court's free speech jurisprudence as well as recent cases implicating associational rights buttress the decision of the majority and could have created a consensus that some of the dissenters might have joined.

### A. Expressive Association

The Court correctly recognized that BSA is an expressive association. As Justice O'Connor noted in *Roberts*, "[t]he purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression."<sup>120</sup> The Boy Scouts promotes camping and other outdoor activities as a means of "building character, fostering citizenship, and developing mental, moral, and physical fitness."<sup>121</sup> Scouting's purpose of instilling traditional notions of morality and good citizenship in its members is inherently expressive and thus entitled to constitutional protection from state interference.

The criteria for membership and leadership in an expressive association are themselves expressive and constitutive of the identity of the organization. "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."<sup>122</sup> The choice of a leader is a particularly expressive decision, the quality of which goes far beyond the communication of specific explicit messages—the choosing of leaders shapes the direction of the organization. As the Court noted only two days prior to the *Boy Scouts* decision, "[i]n no area is the political association's right to exclude more important than in the process of selecting its [leader]."<sup>123</sup> There can be few more effective ways to frustrate BSA's promotion of its notions of morality than to admit vocal opponents of that message as its leaders.

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120. *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

121. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 245 (Cal. 1998).

122. *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

123. *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000) (Scalia, J., writing for a seven-Justice majority).

*I. Scouting's Message on Sexual Morality*

The dissent's objection was not that Boy Scouting is not expressive. Rather, Justice Stevens argued that BSA does not make sexuality a subject of its expression and thus cannot claim the protection of expressive association with respect to excluding individuals of differing views on sexuality. The Scouts "fail[ed] to connect its alleged policy [of excluding homosexuals] to its expressive activities."<sup>124</sup> As Justice Souter concluded, "BSA has not made out an expressive association claim . . . not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy."<sup>125</sup> Simply put, an organization that espouses a view on topic "A" cannot exclude those who disagree on topic "B," and the Scouts only advocate with regards to topic "A." According to Justice Stevens "there is no evidence here that BSA's policy [of excluding homosexuals] was necessary to—or even a part of—BSA's expressive activities or was every taught to Scouts" [sic].<sup>126</sup> He contended that the Boy Scouts could not show that it was "organized for specific expressive purposes" with regard to sexual orientation that would be burdened by Dale's admission.<sup>127</sup> Justice Stevens concluded that "[t]here is no shared goal or collective effort to foster a belief about homosexuality at all."<sup>128</sup>

Justice Stevens was correct to suggest that the Boy Scouts do not assemble for the purpose of discriminating against homosexuals. Boy Scouting does not exist to "provide a public forum for its members to espouse the benefits of heterosexuality and the 'evils' of the homosexual lifestyle."<sup>129</sup> However, this does not mean that the Boy Scouts does not express views on sexuality. Justice Stevens was simply wrong to write that "neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters."<sup>130</sup> Far

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124. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2466 (2000) (Stevens, J., dissenting).

125. *Id.* at 2479 (Souter, J., dissenting).

126. *Id.* at 2470 (Stevens, J., dissenting).

127. *Id.* at 2469 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1,13 (1988)).

128. *Id.* at 2470.

129. *Dale v. Boy Scouts of America*, 706 A.2d 270, 288 (N.J. Super. Ct. App. Div. 1998).

130. *Boy Scouts*, 120 S. Ct. at 2461 (Stevens, J., dissenting).

from “underscor[ing] this point,” BSA’s most significant “published guidance,” *The Boy Scout Handbook*, contradicts it. Under the bolded heading “Morally Straight,” the ninth edition of *The Boy Scout Handbook* addresses each Scout’s “relationship to other people.”<sup>131</sup> It reads:

While you are a boy you have the chance to prepare yourself for life through Scouting. But eventually you leave boyhood behind. You become a man. You must “Be Prepared” to act like one.

As a young man you are capable of becoming a father. God has given you this very high trust.

Some young people destroy their lives by failing in that great trust.

\* \* \*

When you live up to the trust of fatherhood your sex life will fit into God’s wonderful plan of creation. Fuller understanding of wholesome sex behavior can bring you lifelong happiness. A moment of so-called sexual freedom can turn into a lifetime of regrets. “The good life that could have been” is wrecked for many unwed teenagers burdened by babies for whom they are unable or unready to shoulder the full responsibility of parenthood.

You owe it to yourself to enter adult life without regrets. You owe it to yourself to learn what is right. Proper sex education will give you the knowledge you need. It will enrich your life.<sup>132</sup>

Thus, Scouting has presented the “morally straight” requirement in its primary literary vehicle—*The Boy Scout Handbook*—as encouraging sexual abstinence until marriage with an eye toward fatherhood. Implicit is the teaching of a monogamous heterosexual lifestyle within the bond of matrimony. To say that the Boy Scouts espouses “traditional values” is an understatement. As counsel for the Boy Scouts noted at oral argument, “Boy Scouting is so closely identified with traditional moral values that the phrase, he’s a real Boy Scout, has entered the language.”<sup>133</sup>

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131. See THE OFFICIAL BOY SCOUT HANDBOOK 525 (9th ed. 1979) (1985 prtng.).

132. *Id.* at 526. Similar language can be found in the BOY SCOUTS OF AMERICA EXPLORER MANUAL (1956).

133. Transcript of Oral Argument at \*3, *Boy Scouts of America v. Dale*, 120 S. Ct.

In portraying the Boy Scouts' position on sexuality as agnostic, Justice Stevens observed, "Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization."<sup>134</sup> He then quoted from *The Boy Scout Handbook*: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know."<sup>135</sup> While acknowledging that "Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature," Justice Stevens noted that "Scoutmasters are, literally, the last person Scouts are encouraged to ask."<sup>136</sup> To support this proposition he again borrowed from the *Handbook*: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster."

What is troubling, even disturbing, about Justice Stevens's mischaracterization of Scouting's position on sexuality, is that he selectively quoted from *The Boy Scout Handbook*.<sup>137</sup> The excerpted passages come from the end of the very section titled "Sexual Responsibility." That section, reprinted in its entirety, reads as follows:

#### SEXUAL RESPONSIBILITY

As you grow into manhood, your friendships will change. People around you are also changing. Girls you know are becoming young women. They are growing both physically and emotionally. Your relationships with them will become closer and more meaningful to you and to them.

You are maturing sexually, too. As a young man, you are capable of becoming a father. That is a profound responsibility with powerful consequences in your life and the lives of others. It is a responsibility that requires your very best judgment.

Sex is not the most important or most grown-up part of a relationship. Having sex is never a test of maturity. True manliness comes from accepting the responsibility for your

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2446 (2000) (No. 99-699), available at 2000 WL 489419 [hereinafter Transcript of Oral Argument].

134. *Boy Scouts*, 120 S. Ct. at 2462 (Stevens, J., dissenting).

135. *Id.* (quoting THE BOY SCOUT HANDBOOK).

136. *Id.*

137. See THE BOY SCOUT HANDBOOK 527 (10th ed. 1990). The section on "Sexual Responsibility" in the tenth edition is reproduced identically in the 1998 eleventh edition.

actions toward others and yourself in the following ways:

*Your responsibility to women.* Whenever you like someone, you want the best for that person. A healthy relationship is supportive and equal. You owe it to the women in your life to keep their best interests in mind. You can have a terrific time together enjoying life and growing emotionally. However, the difficulties created by a pregnancy can be enormous. Don't burden yourself and someone you care for with a child neither of you is ready to bear.

*Your responsibility to children.* When you are fully grown and have become secure in yourself and in your relationship with another person, the two of you may decide to marry and have a child. That is a wonderful choice full of challenges and rewards. By waiting until you are thoroughly prepared to be parents, you can give your own child a close, loving family in which to grow.

*Your responsibility to your beliefs.* For the followers of most religions, sex should take place only between married couples. To do otherwise may cause feelings of guilt and loss. Abstinence until marriage is a very wise course of action.

*Your responsibility to yourself.* An understanding of wholesome sexual behavior can bring you lifelong happiness. Irresponsibility or ignorance, however, can cause a lifetime of regret. AIDS and venereal diseases spread by sexual contact may undermine your health and that of others. Having a baby before you are ready may drastically limit your future chances for education, occupations, and travel.

You owe it to yourself to enter adulthood without burdens. You owe it to yourself to enrich your life by learning what is right. Your religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.

Learn by asking, remember? If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster. They have experienced much of life, and they are interested in what is best for you. Let them know your concerns.<sup>138</sup>

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138. *Id.* at 527-28. This section can be found in THE BOY SCOUT HANDBOOK (11th ed. 1998) at pages 376-77. It was quoted in part by the Boy Scouts in their brief. *See*

Although it is true that the *Handbook* does not expressly address homosexuality, that omission is not in a vacuum. The *Handbook* encourages “[a]bstinence until marriage” and discusses “wholesome sexual behavior” as the product of heterosexual marriage and a precursor to parenthood. It can be argued that Scouting’s view on sexuality is antiquated, naive, chauvinist, or even bigoted, but not that it is nonexistent.

Justice Stevens’s approach threatens to undermine the very credibility of the judiciary. Picking through a party’s literature and choosing to rely upon only certain passages out of context does violence to our system of justice. It is one thing for judges to read a set of facts and draw a conclusion that a party might disagree with; it is altogether different to pick and choose among parts of an organization’s message that are directly on point, discarding those which do not support a particular outcome.

## 2. *The Effect of Conflicting Messages: BSA’s and Dale’s*

Once it is understood that the Boy Scouts has a message on sexual morality, specifically that abstinence until marriage “is a very wise course of action,”<sup>139</sup> then it becomes clear that Dale’s views on sexuality are in direct conflict with those of the Boy Scouts. Forcing the Boy Scouts to accept as a leader and a member “an applicant whose manifest views were at odds with a position taken by the club’s existing members” would violate the Boy Scouts’ right to expressive association.<sup>140</sup>

As Justice Brennan noted, “[g]overnment actions that may unconstitutionally infringe upon this freedom [of expressive association] can take a number of forms.”<sup>141</sup> An example of such an unconstitutional infringement is “interfere[nce] with the internal organization or affairs of the group.”<sup>142</sup> Justice Brennan concluded that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept

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Brief for Petitioners, *supra* note 26, at \*4-5. At least one amicus also cited this section in part. See Brief for Allied War Veterans Council, *supra* note 25, at \*6.

139. THE BOY SCOUT HANDBOOK 377 (11th ed. 1998).

140. *Hurley v. Irish-American Gay, Lesbian and Bisexual group of Boston, Inc.*, 515 U.S. 557, 581 (1995).

141. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

142. *Id.* at 623.

members it does not desire."<sup>143</sup> In this case, an organization has excluded an individual who advances views contrary to those of the organization, a right fundamental to freedom of association.<sup>144</sup> "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."<sup>145</sup>

Part of what drives the dissent is a persistent comparison of the Boy Scouts to the Jaycees, Rotary Club, and other such organizations.<sup>146</sup> Justice Stevens noted that the Court has "routinely and easily rejected assertions of [free association] by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations."<sup>147</sup> But the Boy Scouts is not comparable to formal educational, employment, and commercial settings. As for clubs, *Boy Scouts of America v. Dale* was unlike those cases in which the Court rejected First Amendment challenges to state public accommodation laws by clubs seeking to exclude individuals on grounds unrelated to views advanced by the organizations. In the *Roberts* trilogy, the Supreme Court stressed that the laws that withstood constitutional scrutiny "require[d] no change in the [organization's] creed" and "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."<sup>148</sup> Those laws erected no obstacle to "a club seek[ing] to exclude individuals who do not share the views that the club's members wish to promote,"<sup>149</sup> and did "not require the clubs to abandon or alter" any expressive activities.<sup>150</sup>

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143. *Id.*

144. See *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000) (noting that "a corollary of the right to associate is the right not to associate").

145. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981) (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (1978)).

146. See *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2467-68 (2000) (Stevens, J., dissenting).

147. *Id.* at 2467 (citations omitted).

148. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

149. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

150. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987). It is also worth noting that at the time *Roberts* was decided the Jaycees admitted women as associate members, though not full members. See *Roberts*, 468

What the dissent also failed to capture is that the Boy Scouts of America is a different kind of civic organization. The Jaycees and Rotarians are groups of adults, typically meeting in a business setting, whose purpose is to reinforce civic values rather than inculcate general morals.<sup>151</sup> Hundreds may be members of a particular chapter.<sup>152</sup> In stark contrast, the membership of the Boy Scouts consists predominantly of—as the name suggests—boys. The vast majority of Scouts are *children*, from ages eleven through seventeen, meeting in patrols of six to eight boys.<sup>153</sup> Thus the dynamics of their interactions are different in nature from even young adults in a quasi-professional setting. As one amicus put it, “[t]here are few Rotary meetings conducted in pup tents.”<sup>154</sup>

The role of the adults in Scouting is also very different from that of a leader in the Jaycees or Rotary Club. The Scoutmaster is not selected from a Scout’s peers. He is an authority figure. Responsibility for inculcating Boy Scouting’s values is entrusted to the Scoutmaster and Assistant Scoutmasters. As Justice Souter noted this Term in *Troxel v. Granville*, “[w]hether for good or for ill, adults not only influence but may indoctrinate children.”<sup>155</sup> If a boy is in doubt about how to conduct himself, *The Boy Scout Handbook* tells him he may look to his Scoutmaster as an example. Thus, the dissent’s conclusion that New Jersey’s law “does not ‘impos[e] any

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U.S. at 613. Similarly, at the time of *Rotary Club*, women were already allowed to join organizations sponsored by Rotary International. *Rotary Club*, 481 U.S. at 541. Given that these organizations “already invite[d] women to share the group’s views and philosophy and to participate in much of its training and community activities,” it was easy for the Court to hold that there was “no basis in the record for concluding that admission of women as full voting members [would] impede the organization’s ability to engage in . . . protected activities or to disseminate its preferred views.” *Roberts*, 468 U.S. at 627. The Boy Scouts, however, has never invited nor apparently allowed avowed homosexuals to be part of any facet of the organization. To the contrary, “[s]ince its inception Scouting has sincerely and unswervingly held to the view that an ‘avowed’, sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath . . . and Scout Law.” *Dale v. Boy Scouts of America*, No. MON-C-330-92, slip op. at 39-40 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995); see also *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 266-67 (2000) (“[The Boy Scouts’] exclusion of gays seems to have been an attempt by the organization to define itself ideologically and to express its belief that homosexuality is axiomatically incompatible with what it considers ‘morally straight’ and ‘clean.’”).

151. See *Roberts*, 468 U.S. at 612-13; *Rotary Club*, 481 U.S. at 539-40.

152. See *Roberts*, 468 U.S. at 621; *Rotary Club*, 481 U.S. at 546.

153. See THE BOY SCOUT HANDBOOK 4, 17 (11th ed. 1998).

154. Brief for Allied War Veterans Council, *supra* note 25, at \*18.

155. 120 S. Ct. 2054, 2067 (2000) (Souter, J., concurring in judgment).

serious burdens' on BSA's 'collective effort on behalf of [its] shared goals'" is suspect.<sup>156</sup> What better way to frustrate Boy Scouting's ability to promote its understanding of sexual morality than to install as troop leaders those who disagree with Boy Scouting's message?

In Scouting, the adult leader is primarily engaged in the expression of ideas. He expresses these ideas directly by what he tells the boys and indirectly as a role model. As the trial court found in *Curran*, the "forced inclusion of a Scout Leader who has publicly acknowledged his or her homosexuality and has expressed beliefs contrary to the Boy Scouts' view . . . would substantially impact the [Boy Scouts'] ability to get across its preferred message in its preferred way."<sup>157</sup> Moreover, the *Curran* appeals court found that "undisputed evidence" showed that "an avowed homosexual scoutmaster would cause the boys to be more likely to believe that homosexual conduct is morally straight," contrary to the Boy Scouts' message.<sup>158</sup> This is of no surprise, particularly considering that Scout leaders are expected to wear the Scout uniform, which is filled with symbolic meaning. "[P]utting on the uniform is a sign to the world that one has taken the Scout obligations and folks expect Scout-like acts from one wearing it."<sup>159</sup> The Scoutmaster is the agent through which Boy Scouts "teach the values of Scouting."<sup>160</sup> The life modeled by the uniformed Scout leader is meant to communicate the very values of Scouting.

This is not to suggest that Scoutmasters are perfect all of the time, nor that they are required to be. BSA sets high ideals for its members in the expectation that Scouts will constantly strive to recognize those ideals in their lives. When a Scout or Scout leader's conduct demonstrates a sustained rejection of BSA's core principles, however, expulsion of that member becomes necessary to preserve the integrity of the BSA message. BSA consistently revokes the membership of individuals who

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156. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2459-60 (2000) (Stevens, J., dissenting) (quoting *Roberts*, 468 U.S. at 622, 626).

157. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 226 (Cal. 1998) (quoting the trial court).

158. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580, 590 (Cal. App. 1994).

159. *THE BOY SCOUT HANDBOOK 12* (11th ed. 1998) (quoting from BSA's *HANDBOOK FOR BOYS* (3d ed. 1927)).

160. *Curran*, 952 P.2d at 226 (quoting the trial court).

present a message antithetical to its own. This includes, but is not limited to, messages about sexuality. Adults have been denied leadership positions in Scouting for their various views and behaviors that Boy Scouts of America deems inconsistent with the Scout Oath and Scout Law, "from openly adulterous behavior to the bringing of alcohol to Scouting events to known substance abuse outside of Scouting."<sup>161</sup> A heterosexual Scout leader with fifty-nine years in Scouting was dismissed for protesting BSA's exclusion of atheists, homosexuals, and women.<sup>162</sup> BSA has also excluded members who refuse to affirm a "Duty to God" as required by the Scout Oath.<sup>163</sup> Even individuals who just cause "continuing disruption" to the Boy Scouts have been expelled.<sup>164</sup>

Justice Stevens suggested that an "Olympic gold medal winner or a Wimbledon tennis champion[] being 'openly gay' perhaps communicates a message," but that it is "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."<sup>165</sup> Perhaps a small-town newspaper article does not attract much attention in large, "sophisticated" cities such as Washington, D.C., where world news and the latest political posturing dominate the headlines. However, in towns throughout America where much of Boy Scouting takes place, a local newspaper article can be quite the attention-grabber. Thus, although Justice Stevens was certainly correct that "BSA does not discourage or forbid outside expressive activity,"<sup>166</sup> if an outside activity begins to distract from Scouting's values the Scout or Scout leader may be removed. To use Justice Stevens's examples,<sup>167</sup> for a Scout or Scout leader to be active in his faith or in politics does not create a conflict

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161. Brief for Petitioners, *supra* note 26, at \*4.

162. See Carol Ness, *Scouts Expel Longtime Leader*, S.F. EXAMINER, Sept. 13, 1998, at B1.

163. See, e.g., *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261 (Cal. 1998).

164. David Brummer, *Boy Scout Volunteers Seek to Restore Their Posts*, THE PANTAGRAPH (Bloomington, Ill.), Mar. 29, 1998, at A10.

165. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2477 (2000) (Stevens, J., dissenting).

166. *Id.* at 2473.

167. See *id.*

with Scouting because the Boy Scouts teaches "Duty to God" and participatory citizenship. However, if a Scout or adult leader is known to be actively involved with an organization or a cause that directly contradicts what Scouting teaches, there is a real conflict. For example, a troop's acceptance of a known and avowed Ku Klux Klansman as an Assistant Scoutmaster would interfere with the organization's message of racial harmony even if the Assistant Scoutmaster never uttered a word on the subject of race.<sup>168</sup> Such an individual could, and presumably would, be removed from the Boy Scouts.

### 3. *What Message is Sufficient?*

Even if we accept that the Boy Scouts does have a position on sexual morality that embraces so-called "traditional moral values,"<sup>169</sup> the dissent might still be read to object that "Scouting was not sufficiently 'anti-gay' to receive First Amendment protection for its views."<sup>170</sup> As noted earlier, Justice Souter stated that he resolved the case as he did "not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy."<sup>171</sup> This suggests that it is not enough for the Scouts to teach that proper sexual morality consists of abstinence until heterosexual marriage, but rather that BSA must actively teach that homosexuality is wrong. Such is a stunted view of the law and one that produces insidious results.

First, this view effectively eviscerates Scouting's overall approach to teaching youth. BSA prefers to instruct its members as to what *should* be done, not as to what should *not* be done, a preference protected by freedom of speech. The founder of Scouting, Robert Baden Powell, initially considered including an additional point in the Scout Law, "A Scout is not a fool," but discarded it with the view that the Law should be only a catalogue of affirmative virtues.<sup>172</sup> As the Court noted,

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168. See *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring) ("Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?").

169. Transcript of Oral Argument, *supra* note 133, at \*3.

170. Brief for Petitioners, *supra* note 26, at \*17.

171. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2479 (2000) (Souter, J., dissenting).

172. THE OFFICIAL BOY SCOUT HANDBOOK 515 (9th ed. 1979) (1985 prtg.).

"the Scout Oath and Law provide 'a positive moral code for living; they are a list of 'do's' rather than 'don'ts.'"<sup>173</sup> It is Scouting's right to continue to present a positive message rather than a litany of negatives. Further, the Scoutmaster and Assistant Scoutmasters "necessarily teach by example as much or more than they teach by proscription. Boy Scouts do not simply see one aspect of an adult leader's character; they see it all."<sup>174</sup> *The Scoutmaster Handbook* tells leaders that they are expected to set "an example for themselves and for others by living the Scout Oath and Law to the best of their abilities."<sup>175</sup> The approach suggested by the dissent would vitiate the ability to teach by example.

Second, this view is directly contradicted by the Court's jurisprudence. As noted in *Hurley*, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."<sup>176</sup> The Boy Scouts' view on sexual morality need not be its singular or primary purpose in order to be protected. Nor does the Boy Scouts need to present a "narrow, succinctly articulable message [as] a condition of constitutional protection."<sup>177</sup> Instead, as Justice O'Connor suggested in *Roberts*, "[e]ven 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."<sup>178</sup> Such describes the Boy Scouts.

Finally, requiring the Scouts actively to teach that homosexuality is wrong in order to receive First Amendment protection restricts the freedom of association to pure advocacy groups and to only pure advocacy groups, including unseemly

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173. *Boy Scouts*, 120 S. Ct. at 2452 (quoting Brief for Petitioners, *supra* note 26, at \*3-4).

174. Brief for Petitioners, *supra* note 26, at \*3-4.

175. THE SCOUTMASTER HANDBOOK 6 (1998).

176. *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 569-70 (1995).

177. *Id.* at 569.

178. *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (citing as examples commentaries on THE OFFICIAL BOY SCOUT HANDBOOK (9th ed. 1979)).

entities such as the Ku Klux Klan.<sup>179</sup> This cannot possibly be a desirable outcome: to drive organizations to the extreme fringes of society in order for them to secure constitutional protections. Instead, as Justice O'Connor noted in *Roberts*, "[i]t is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service."<sup>180</sup> As one commentator put it, "a group should not need to have an anti-gay agenda to hold the view that homosexual behavior is wrong."<sup>181</sup> The Boy Scouts attempts "to walk the line between tolerance toward all people and disapproval of some types of conduct."<sup>182</sup> "That [Scouts] wish to express their view by example or by quiet persuasion, rather than an outspoken campaign, does not diminish their right to take a position on moral issues."<sup>183</sup> The dissent's approach could force organizations actively to take sides, an outcome prohibited by *Hurley*.<sup>184</sup>

### B. Freedom of Speech

Much of the discussion up to this point has focused on whether the Boy Scouts of America has a message about sexual morality. It is appropriate to examine what protection, if any, the Scouts' message is due under the Free Speech Clause of the First Amendment.

As explained in Part III.A, the Boy Scouts teaches morality

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179. See *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288-89 (D. Md. 1988). This was an outcome the majority rejected outright. While acknowledging that "to come within [the First Amendment's] ambit, a group must engage in some form of expression," the Court specifically noted that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000).

180. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

181. Steffen N. Johnson, *A Case the Scouts Had to Win*, N.Y. TIMES, June 30, 2000, at A25.

182. Reply Brief for Petitioners, at \*5, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at 2000 WL 432367.

183. See Johnson, *supra* note 181.

184. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 573 (1995) (noting a crucial "manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" (quoting *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986))).

and character in all aspects of life.<sup>185</sup> BSA contends that sexual morality is addressed in the Boy Scout Oath and Law under the “morally straight” and “clean” requirements of the Oath and Law.<sup>186</sup> *The Boy Scout Handbook* advises the boys that being “clean” goes beyond washing off dirt and encompasses choosing “the company of those who live by high standards” and avoiding “foul language,” “harmful thoughts,” and “dirty stories.”<sup>187</sup> The *Handbook* teaches “sexual responsibility” and addresses proper relationships with young women.<sup>188</sup> Scouting teaches about the great responsibility of fatherhood.<sup>189</sup> It describes “true maturity” and sexual responsibly in the following areas:

Your Responsibility to Young Women  
 Your Responsibility As a Future Parent  
 Your Responsibility to Your Beliefs  
 Your Responsibility to Yourself<sup>190</sup>

Rather than cataloguing sexual practices that are not morally straight, the Boy Scouts presents an approach to sexuality that emphasizes marriage and fatherhood and counsels against premarital sex. BSA has a message about sex that it communicates to its own members as well as to anyone willing to read its *Handbook*. Scouts do not just assemble because they share these values. Rather, Boy Scouting exists to teach these moral values and many others.<sup>191</sup> Thus, *Boy Scouts* does not just present a case about the freedom to associate for expressive purposes, but also the right to communicate a message. The

185. See THE BOY SCOUT HANDBOOK 1 (11th ed. 1998) (“The Scout Oath and the Scout Law can guide you while you are a Scout and throughout your life.”).

186. See *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2452 (2000).

187. THE BOY SCOUT HANDBOOK 53 (11th ed. 1998).

188. See *id.* at 376-77. This section is excerpted in Part III.A.1, *supra*.

189. See *id.*

190. *Id.* at 376-77.

191. “It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people.” *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000) (quoting the Boy Scouts of America Mission Statement). Perhaps Scouting’s founder, Baden Powell, put it best: “Don’t let the technical outweigh the moral. Field efficiency, backwoodsmanship, camping, hiking, good turns, jamborees, comradeship, are all means, not the end. The end is character. Character with a purpose.” *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580, 584 (Cal. App. 1994).

fact that the Boy Scouts has a message about sexual morality arguably makes its case an even stronger one for constitutional protection than that presented in *Hurley*.

The dissents turned in part on the notion that the Boy Scouts does not associate for the purpose of advocating a view on homosexuality.<sup>192</sup> Although the dissenters presumably would have no trouble concluding that the Scouts associate for training in "scoutcraft, . . . patriotism, courage, [and] self-reliance,"<sup>193</sup> all of which are unquestionably expressive, Justice Stevens observed that "there is no evidence here that BSA's policy [of excluding homosexuals] was necessary to—or even a part of—BSA's expressive activities."<sup>194</sup> Although the Boy Scouts has a message or view on sexual morality, the dissent did not consider it part of why Boy Scouting exists. This is a fair point. It would be impossible to prove that Scouts assemble for the primary purpose of sex education. In fact, Scouting's instructions to leaders teach otherwise.<sup>195</sup> But this does not mean that sexual morality is not part of the values BSA espouses. Although the dissents were troubled with extending the protections of expressive association under these circumstances, they still should have considered the Boy Scouts' plain message of sexual morality found in *The Boy Scout Handbook* under the Free Speech Clause of the First Amendment.

The Boy Scouts' message may be unpopular or offensive, but it is no less protected. The Supreme Court has clearly indicated that freedom of speech is of fundamental importance in checking governmental control over citizens' expression of ideas.<sup>196</sup> Nothing could be more inconsistent with First Amendment principles than for the state to deny an organization its free speech rights based on the perceived social

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192. See *Boy Scouts*, 120 S. Ct. at 2470 (Stevens, J., dissenting); *id.* at 2479 (Souter, J., dissenting).

193. *Id.* at 2460 (Stevens, J., dissenting).

194. *Id.* at 2470.

195. See THE SCOUTMASTER HANDBOOK 133 (7th ed. 1981) ("You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life.").

196. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 579 (1995) (noting that if the "point of applying the state law to expressive conduct" is to produce neutral expressive conduct, "it is a decidedly fatal objective").

or political propriety of the message. Such an approach “grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.”<sup>197</sup>

Scouting could offer a message of morals and values that excluded sexual matters; however, “[d]isapproval of a private speaker’s statement does not legitimize the use of the [state’s] power to compel the speaker to alter the message.”<sup>198</sup> Just last Term, Justice Stevens warned about placing those with “minority views . . . at the mercy of the majority.”<sup>199</sup> Applying the New Jersey law to the Boy Scouts in this manner arguably places its “minority views” at the “mercy of the majority.”<sup>200</sup>

The question is whether the Boy Scouts’ message is compromised by the New Jersey public accommodations law. Does requiring BSA to have Dale as a leader “violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”?<sup>201</sup>

Dale argued that he, “like other openly gay youth and adults, can effectively do everything that BSA expects of its members,” and that he “can continue to teach the affirmative character traits central to Scouting.”<sup>202</sup> Further, Dale asserted that he could “serve as a role model in the same way that other Scoutmasters do”<sup>203</sup> and “be bound by the same directives and limitations placed on all Scoutmasters.”<sup>204</sup> If allowed to be an Assistant Scoutmaster, Dale contended that he would communicate Boy Scouting’s message and would not communicate an unwelcome message of his own.<sup>205</sup> However, this is predicated on the view that the Boy Scouts’ message is not inconsistent with homosexual behavior. Presumably when Dale said he was willing to “continue expressing ‘the Oath and Law[s]’ positive moral code for living,”<sup>206</sup> he meant that he

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197. *Id.*

198. *Id.* at 581.

199. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2276 (2000).

200. *Id.*

201. *Hurley*, 515 U.S. at 573.

202. Brief for Respondent, *supra* note 41, at \*31.

203. *Id.*

204. *Id.* at 33.

205. *See id.* at 31-33.

206. *Id.* at 33 (quoting Brief for Petitioners, *supra* note 26, at \*3).

would impart his own interpretation, which at a minimum excludes sexual matters altogether, in direct conflict with the Boy Scouts' own view. Regardless of whether Dale was silent on sexual matters in the Scouting setting, he might in fact communicate an unwelcome, antithetical message by the fact that he has stated publicly that he disagrees with BSA's moral position on homosexuality and that he "owe[s] it to the organization to point out to them how bad and wrong this policy is."<sup>207</sup> One of Dale's concerns as co-president of the Rutgers University Lesbian/Gay Alliance was for the lack of gay role models for gay teenagers.<sup>208</sup> As a teenager Dale says he "was looking for a role model, someone who was gay and accepting of [him]."<sup>209</sup> Moreover, Dale counseled Scouts about being in the Boy Scouts and being homosexual.<sup>210</sup> These are all legitimate exercises of Dale's First Amendment rights; however, Dale's message about sexuality simply contradicts BSA's.

The Scoutmaster serves as a teacher and a role model to the boys in his troop—he is the conduit through which Scouting disseminates its message. If a Scoutmaster chooses not to convey part of Scouting's message, then BSA's ability to espouse its view is handicapped. *The Scoutmaster Handbook* advises the potential leader that "[t]he Scouts in your troop will look up to you for guidance on a number of levels, many of them unspoken."<sup>211</sup> A Scoutmaster who in word or by example fails to follow Scouting's moral code can influence boys in a manner contrary to BSA's desired, albeit controversial, message. Thus, the *Curran* appeals court found that admitting "an avowed homosexual scoutmaster would cause the boys to be more likely to believe that homosexual conduct is morally straight," contrary to the Boy Scouts' message.<sup>212</sup> Although James Dale may be "morally straight" by many definitions,

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207. Dara N. Sharif, *Gay, Expelled Scout Sues to Regain His Membership, Cites N.J. Anti-bias Law*, REC. N. N.J., July 30, 1992, at A3, available at 1992 WL 9444252.

208. See Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark, N.J.), July 8, 1990.

209. *Id.* (quoting James Dale).

210. *New Jersey Man Sues Scouts over Ouster for Homosexuality*, AUSTIN AMERICAN-STATESMAN, August 6, 1992, at A13, available at 1992 WL 4738446.

211. THE SCOUTMASTER HANDBOOK 3 (1998).

212. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580, 590 (Cal. App. 1994).

BSA contends that he is not under *its* definition. If a single, self-identifying banner in a multifarious parade triggers First Amendment protection, perhaps limiting leadership positions to individuals “whose *manifest views* [are not] at odds with a position taken by the club’s existing members” is entitled to similar protection.<sup>213</sup> This might hold regardless of the “size and success” of the organization.<sup>214</sup>

The Supreme Court in *Hurley* unanimously affirmed that “all speech inherently involves choices of what to say and what to leave unsaid.”<sup>215</sup> A speaker has the right to tailor his speech as he sees fit. Such speech includes “expressions of value, opinion, or endorsement, [as well as] statements of fact the speaker would rather avoid.”<sup>216</sup> In other contexts it has been argued that “coming out” is an expressive and political act.<sup>217</sup> BSA disagrees with Dale’s position on this matter, choosing quiet inculcation of heterosexual marriage as its message rather than

213. *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 581 (1995) (emphasis added).

214. *Id.* at 577.

215. *Id.* at 573 (quoting *Pacific Gas & Elec. Co. v. Public Utils. Comm’n of Cal.*, 475 U.S. 1, 11 (1986)).

216. *Id.* (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995); *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988)); see also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

217. See, e.g., Amici Curiae Brief of the ACLU and Lambda Legal Defense and Education Fund in Support of Appellant at 21- 23, 27, *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1995) (describing the discrimination imposed by the military’s “don’t ask, don’t tell” policy as “viewpoint-based,” Lambda and the ACLU maintained that “the Navy discharged Thomasson based on the fact that he had revealed his gay identity, not based on that identity itself” and that a “verbal or written ‘state[ment] that [one] is a homosexual . . .’ is obviously constitutionally-protected pure speech.”) (emphasis removed). One commentator describes “[t]he idea of identity [in gay rights cases is] more complicated and unstable than either simply status or conduct. It encompasses explanation and representation of the self. Self-representation of one’s sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out—to act on and live out that identity.” Nan D. Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695, 1696 (1993). Professor William Eskridge also notes that “[a]n admission of sexual identity is expressive in the strictest sense of the word.” WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 176 (1999). Courts considering the matter have reached somewhat similar conclusions. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (suggesting that homosexuality is identifiable only by expressive activity such as conduct or affirmation); *Fricke v. Lynch*, 491 F. Supp. 381, 384 (D.R.I. 1980) (holding that a gay student seeking to attend high school prom with male escort had “expressive content” that constituted a “political message”); *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979) (“[T]he struggle of the homosexual community for equal rights . . . must be recognized as a political activity. . . . [O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to ‘come out of the closet.’”).

adopting a view consistent with Dale's. In doing so, BSA made 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."<sup>218</sup> In sum, while it is true that "Dale did not carry a banner or a sign"<sup>219</sup> and thus that "Dale's status as a scout leader is not equivalent to a group marching in a parade,"<sup>220</sup> such a narrow application of *Hurley* fails to appreciate that BSA's acceptance into its membership of an individual who openly defies Scouting principles curtails BSA's ability to promote a message consistent with its own values. The same nine Justices who heard *Boy Scouts of America v. Dale* earlier concluded that "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."<sup>221</sup> Had *Boy Scouts of America v. Dale* been understood as a clash of "manifest views," perhaps the dissenters would have come to a different conclusion.

### C. Intimate Association

Because the Boy Scouts of America is on one level a large, national organization having "generously welcomed over 87 million young Americans into its ranks,"<sup>222</sup> it is tempting to cast aside without a second thought the Boy Scouts' argument that it is protected by the freedom of intimate association. One can certainly appreciate the dissent's brief treatment of this argument.<sup>223</sup> However, upon peeling back the layers to understand the kind of organization that BSA is on a functional level, there is a strong argument that, applying the Court's dicta to date describing intimate association, the Scouts should be protected by the freedom of intimate association. Complicating this argument is that the intimate association doctrine is closely linked with familial interests. As it has come to be interpreted, "the *Roberts* analysis narrowly confines intimate association to 'deep attachments and commitments'

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218. *Hurley*, 515 U.S. at 575.

219. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2475 (2000) (Stevens, J., dissenting).

220. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1229 (N.J. 1999).

221. *Hurley*, 515 U.S. at 581.

222. *Boy Scouts*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

223. *See id.* at 2477 n.26.

such as marriage and child rearing.”<sup>224</sup> Because neither the Court nor the dissent gave this argument serious consideration, *Boy Scouts* represents a lost opportunity to flesh out the contours of intimate association—either limiting it to family-like relationships or signaling that it does actually protect a broader variety of relationships.

Certainly there is a compelling argument that freedom of intimate association should be limited to contexts such as the family, dating, and close friendships. However, the Supreme Court has previously declined to accept such a restrictive interpretation.<sup>225</sup> As the majority decision in *Boy Scouts* was based on associational freedom rather than speech as such, this case provided an opportunity for the Rehnquist Court to so limit intimate association once and for all. Because the Court only addressed the “expressive” component of associational freedom, the scope of the “intimate” component remains an open question. Therefore, this Part will only analyze whether the Boy Scouts falls within the protection of intimate association as described by earlier Courts.

In *Roberts*, the Supreme Court gave its most elaborate description of the concept of intimate association in relation to one’s constitutionally-afforded liberty. Writing on behalf of the Court, Justice Brennan described the origins of the intimate association doctrine: “[T]he constitutional shelter afforded [intimate] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to the concept of liberty.”<sup>226</sup>

The Court considers specific factors in identifying intimate relationships deserving of constitutional protection, including

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224. Recent Case, 113 HARV. L. REV. 621, 624 (1999) (quoting *Dale*, 734 A.2d at 1220). Similarly, another commentator noted that “[i]t can plausibly be argued that few associations beyond the traditional family relationship are included within the Court’s current conception of what constitutes a constitutionally protected mode of associating.” Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 LAW & SEX. 163, 247 (2000).

225. See *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (“Of course, we have not held that constitutional protection is restricted to relationships among family members.”).

226. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

"relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."<sup>227</sup> Further, associations that foster "deep attachments and commitments" in the "personal aspects of one's life," that have "played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs," or that involve "the raising and education of children" are sufficiently intimate to be afforded protection.<sup>228</sup>

The Boy Scouts embodies these characteristics. Thus, if we accept Justice Brennan's conceptualization of intimate association—the only guidance the Court has offered—it is a right of sufficient scope to encompass the Boy Scouts. If, however, BSA is constitutionally indistinguishable from a Rotary chapter, one is left with precious little idea of what non-familial organization would qualify for constitutional protection under the doctrine of intimate association. Perhaps the correct understanding of intimate association limits it to family-like relations, but it is one the Court has been unwilling to announce. Accepting the *Roberts* Court's characterization of intimate association on its own terms, the intimate nature of members' association within BSA justifies the heightened constitutional protection traditionally afforded such relationships.

### 1. "Relative Smallness"

Although the total national membership of BSA at any particular time is quite large, most Scouting is done within small groups of boys and adult leaders: "Scouting units are small, intimate groups. In the Cub Scout and Boy Scout programs, the units are made up of even smaller groups, dens and patrols, which often meet regularly in private homes."<sup>229</sup> BSA members are organized into local groups called troops, chartered to local community organizations. A typical troop consists of fifteen to thirty boys,<sup>230</sup> but many troops are smaller.

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227. *Id.* at 620.

228. *Id.* at 618-20.

229. THE SCOUTMASTER HANDBOOK 138 (1998) (quoting Rules and Regulations of the Boy Scouts of America, art. XI, § 3, cl. 8).

230. See *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1221 (N.J. 1999).

Dale's troop, for example, consisted of only ten Scouts.<sup>231</sup> Troops are further subdivided into patrols, which consist of six to eight boys.<sup>232</sup> The patrol is the core unit around which a Scout's activities are centered.<sup>233</sup> As the *Handbook* describes,

The Scout patrol . . . is the unit that makes Scouting go. It is a group of boys, usually six to eight, who pal together because they like to do the same kinds of things.

A patrol is a team. . . . All of you work toward the same goal. All of you have a wonderful time. In the patrol, you learn what fun it is to plan and camp together . . . to sing and laugh together homeward bound from a strenuous hike or around a flickering campfire . . . to work together to meet the tests that will carry all of you onward and upward in Scouting.<sup>234</sup>

Thus, although the BSA national organization is quite large, on a functional level it is very small. Far from making it "impossible to conclude that being a member of the Boy Scouts ranks among . . . intimate relationships,"<sup>235</sup> the Boy Scouts' functional size shows that Scouts enjoy unusually tight bonds with their peers and leaders.

## 2. "Selectivity"

The Boy Scouts consists of a large number of boys from diverse backgrounds, but admission to membership is not without the exercise of judgment. To characterize BSA as non-selective is to disregard an important manifestation of selectivity the Supreme Court has emphasized—a "plan or purpose of exclusiveness."<sup>236</sup> BSA is selective in requiring all candidates for membership to "understand *and agree to live by* the Scout Oath . . . [and] Law."<sup>237</sup> Those who refuse to accept and abide by the Oath and the Law are not permitted to join.<sup>238</sup>

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231. See David Schwab, *Scout's Honor*, STAR-LEDGER (Newark, N.J.), July 30, 1992, available at 1992 WL 11077235.

232. See THE BOY SCOUT HANDBOOK 17 (11th ed. 1998).

233. See *id.* (describing patrols as the "building blocks of Scouting").

234. THE OFFICIAL BOY SCOUT HANDBOOK 12 (9th ed. 1979).

235. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2477 n.26 (2000) (Stevens, J., dissenting).

236. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

237. THE BOY SCOUT HANDBOOK 4 (11th ed. 1998) (emphasis added).

238. See, e.g., *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (excluding a boy for failing to affirm his belief in God); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261 (Cal. 1998) (same).

Individuals have been dismissed from BSA for multiple reasons, including embracing atheism,<sup>239</sup> possessing alcohol or illicit substances in the Scouting setting,<sup>240</sup> and advocating views antithetical to BSA's principles.<sup>241</sup> As the Seventh Circuit observed, "[i]n order to maintain [its] principles, it is essential that [BSA] exercise selectivity."<sup>242</sup>

To ensure that he understands BSA's expectations, an applicant must participate in a conference with a Scoutmaster prior to being admitted to membership.<sup>243</sup> This conference provides the applicant an opportunity to ask questions about BSA's principles and to discuss any concerns he (or his parents) might have. Having had this opportunity, and having subsequently agreed to abide by the Scout Oath and Law, a Scout is expected to honor his agreement or risk exclusion from the organization. Moreover, to ensure that the quality and purpose of the program are not compromised, "leader selection [is] taken very seriously."<sup>244</sup> The application to become an adult leader requires meeting the following "Leadership Standards":

The applicant should possess the moral, educational, and emotional qualities necessary to afford positive leadership to youth. The applicant must also be of the correct age, a citizen of the United States of America (or satisfy one of the approved alternatives), and subscribe to the Declaration of Religious Principle, the Scout Oath, and the Scout Law.<sup>245</sup>

Thus, the Boy Scouts of America "not only is selective, but . . . its very Constitution, By-laws and doctrine dictate that it remain selective."<sup>246</sup>

### 3. "Seclusion from Others"

"Troop meetings are usually attended only by members of the troop,"<sup>247</sup> and patrol meetings are often held in private

239. See *Welsh*, 993 F.2d at 1267.

240. See THE OFFICIAL BOY SCOUT HANDBOOK 131 (9th ed. 1979).

241. See *Ness*, *supra* note 162 (noting a Scout leader was dismissed for contesting BSA's views on religious observance, homosexuality, and female membership).

242. *Welsh*, 993 F.2d at 1276.

243. See THE BOY SCOUT HANDBOOK 4 (11th ed. 1998).

244. THE SCOUTMASTER HANDBOOK 134 (1998).

245. Boy Scouts of America Adult Application, Form No. 28-501I.

246. *Welsh*, 993 F.2d at 1277.

247. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal.

homes.<sup>248</sup> Scouting involves many activities such as group hikes and campouts that are far from the public gaze. Unlike Jaycee or Rotary Club meetings, where non-members are often in attendance, neither troop meetings nor outdoor activities such as hikes, campouts, summer camps, or service projects are open to non-Scouts on a regular basis.<sup>249</sup>

Although Justice Stevens did not address this issue, the New Jersey Supreme Court targeted a few special events to which non-members are invited, such as Courts of Honor and School Nights, to find that the "Boy Scouts cannot claim the right of intimate association."<sup>250</sup> These special meetings, however, are limited in number and quite different in nature from a typical Scout meeting. School Nights seek to interest boys in joining BSA and a Court of Honor is held to honor Scouts publicly for advancement in rank and other Scouting achievements.<sup>251</sup> Just as a large wedding ceremony does not undermine a family's right to associate intimately without government interference, so a BSA recognition ceremony should not undermine the Boy Scouts' right to intimate association.

4. "*Deep Attachments and Commitments . . .  
Personal Aspects of One's Life*"

The nature of the Scouting experience gives rise to close, personal relationships. Scouts hike together, cook together, camp together, pray together, and work together.<sup>252</sup> They meet in each other's homes for meetings.<sup>253</sup> The relationships within a Boy Scout troop and patrol are a source of "emotional enrichment" for the Scouts.<sup>254</sup> A Scout troop is often an extension of the boys' "families, and their religious affiliations. For others, a Scout troop might serve as the most stable part of

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Rptr. 2d 580, 597 (Cal. App. 1994) (summarizing the trial court's findings).

248. See THE SCOUTMASTER HANDBOOK 138 (1998).

249. Parents are always invited to attend meetings. See Brief for Petitioners, *supra* note 26, at \*4a (quoting the Boy Scouts of America Information for Parents). Parent volunteers who participate in Scouting activities on a regular basis as a leader, however, are subject to the same membership requirements as are the Scouts.

250. Dale v. Boy Scouts of America, 734 A.2d 1196, 1222 (N.J. 1999).

251. See THE BOY SCOUT HANDBOOK 176 (11th ed. 1998).

252. See *id.* at 129, 216, 247.

253. See THE SCOUTMASTER HANDBOOK 138 (1998).

254. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

their lives."<sup>255</sup> Thus, for many Scouts, "[t]heir Scout patrol and troop are an important part of their self-identity."<sup>256</sup> Boy Scouting offers an opportunity not just to learn and have fun camping and hiking, but to do these things with "your best friends."<sup>257</sup> As the *Curran* trial court found, Boy Scouting "take[s] place principally in small, intimate, primary groups where the relationships can be characterized as continuous, close and personal."<sup>258</sup> The sociological evidence in *Curran* suggests that "[t]he purpose among the members of the group is simply to be together."<sup>259</sup> The *Handbook* affirms this finding. It describes the Scout Patrol, as a group of boys "who pal together because they like to do the same kinds of things."<sup>260</sup>

This intimacy is not just among Scouts; it also is between Scouts and their adult leaders. In the process of building character and teaching morality, the Scoutmaster forms "a very positive, intimate relationship" with his Scouts: "[T]hey will know that he is a man that they can come and talk to when, perhaps, they are uncomfortable talking to anybody else."<sup>261</sup> The Scoutmaster may be the "most influential adult in a boy's life other than the boy's own parents. Even after the scouts leave the troop, scouts often remain close to the scoutmaster and continue to discuss ethical issues with him."<sup>262</sup> Scoutmasters are to create an environment where Scouts feel secure both physically and emotionally.<sup>263</sup> Scoutmasters develop a "close, personal relationship" with each Scout and "'directly influence ethical decision-making by Scouts' through '[p]ersonal example as an ethical person.'"<sup>264</sup>

### 5. "The Culture and Traditions of the Nation"

Since its inception in 1910, approximately eighty-seven million boys have been involved in the Boy Scouts of

255. THE SCOUTMASTER HANDBOOK 126 (1998).

256. *Id.* at 128.

257. THE OFFICIAL BOY SCOUT HANDBOOK 9 (9th ed. 1979).

258. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580, 597 (Cal. App. 1994) (quoting the trial court).

259. *Id.* at 598 (quoting the trial court).

260. THE OFFICIAL BOY SCOUT HANDBOOK 12 (9th ed. 1979).

261. *Curran*, 29 Cal. Rptr. 2d at 598 (quoting the trial court).

262. *Id.* at 590 (discussing the trial court findings).

263. THE SCOUTMASTER HANDBOOK 6 (1998).

264. See *Curran*, 29 Cal. Rptr. 2d at 591 (quoting evidence presented at trial).

America.<sup>265</sup> The numerous works of the great American artist Norman Rockwell depicting Scouts in various settings, the representation of a number of former Scouts in the leadership of government and business,<sup>266</sup> and the continued interest of boys in becoming Scouts all attest to the place of Scouting within the Nation's cultural fabric.<sup>267</sup> Even James Dale agreed that the Boy Scouts enjoys "a unique position in American society."<sup>268</sup> This "unique position" gives rise to a "close association with Congress, the President, the military, [and] the astronaut corps,"<sup>269</sup> an unsurprising development given the number of today's leaders who are former Scouts.

The impact of the Scout Oath and Law on American culture are discussed by Brian Burrell in *The Words We Live By: The Creeds, Mottoes, and Pledges That Have Shaped America*. He writes: "The ideal of personal honor within a principled society is nowhere better represented than by the Boy Scout Laws, which comprise perhaps the best-known code of ethics."<sup>270</sup> Similarly, *The Boy Scout Handbook* has been praised as a work of "permanent social and psychological consequence."<sup>271</sup> Few would contest that the Boy Scouts of America has played an important role in "the culture and traditions of the Nation."<sup>272</sup>

6. "Transmitting Shared . . . Beliefs":  
Scouting as a Religious Organization

Although the Boy Scouts of America is admittedly not

265. See *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2476 (2000) (Stevens, J., dissenting).

266. The Boy Scouts' website lists a number of prominent men who are Eagle Scouts, including former President Gerald Ford, former U.S. Senator Bill Bradley, Apollo 13 astronaut James Lovell, film producer Steven Spielberg, and businessman H. Ross Perot. See <http://www.scouting.org/factsheets/02-529.html>.

267. See Brief for Respondent, *supra* note 41, at \*1 ("Fifty percent of all boys today between the ages of seven and ten are Cub Scouts, and 20 percent between 11 and 18 are Boy Scouts."); Associated Press, *Boy Scouts May Lose Support After Winning Battle Over Gays*, June 30, 2000, available at <http://www.cnn.com/2000/LAW/06/30/scoutsfuture.ap/index.html> (quoting the Scouts' spokesman that "Scout membership has risen 7 percent in the past three years").

268. Brief for Respondent, *supra* note 41, at \*1.

269. *Id.* at \*3.

270. BRIAN BURRELL, *THE WORDS WE LIVE BY: THE CREEDS, MOTTOES, AND PLEDGES THAT HAVE SHAPED AMERICA* 120 (1997).

271. *Id.* at 44 (quoting Paul Fussell).

272. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984).

sectarian, instead teaching respect for "the beliefs of others," it is theistic.<sup>273</sup> As the Seventh Circuit observed, one of the dominant purposes of Scouting "is to equip youth of all races, colors, and creeds to fulfill their duty to God."<sup>274</sup> Indeed, this observation led the Seventh Circuit to conclude that "[t]he Boy Scouts of America would be unable to carry out its very purpose if the government . . . required it to accept members who deny a condition of membership, that is, the belief in God."<sup>275</sup> At almost every meeting and ceremony Boy Scouts and their adult leaders recite the Scout Oath and Law in unison.<sup>276</sup> The Scout Oath opens with the first "Duty" being to God, and the Scout Law closes with the admonition that a Scout is "Reverent."<sup>277</sup> To join or remain a member boys and adults must affirm their "Duty to God" through the Scout Oath. Adult leaders are required to subscribe to the Declaration of Religious Principle, which begins, "[t]he Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God."<sup>278</sup>

Religious affirmation is more than a membership requirement for the Boy Scouts. Scouts must demonstrate that they are living the Scout Oath and Law in their everyday lives, including fulfilling the requirement to be "reverent."<sup>279</sup> The Boy Scouts also sponsors thirty religious awards, tailored to different faiths, that Scouts are encouraged to pursue. Scouts earning these awards are expected to wear them on their Boy Scout uniforms. Each year the Boy Scouts participates in "Scout Sunday," generally held on the first Sunday in February. The U.S. Scouting Service Project, Inc. manages an online forum where Scouts and leaders can request and share prayers.<sup>280</sup> BSA makes available prayers, campfire hymns, and programming ideas based on the theme of reverence.<sup>281</sup> Nearly sixty-five percent of Boy Scouts troops, comprising over half of all Scouts,

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273. *Id.* at 54.

274. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir. 1993).

275. *Id.* at 1277.

276. See Brief for Petitioners, *supra* note 26, at \*3.

277. THE BOY SCOUT HANDBOOK 9 (11th ed. 1998).

278. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1204 n.3 (N.J. 1999).

279. See THE BOY SCOUT HANDBOOK 45, 108 (11th ed. 1998).

280. See <http://www.ussscouts.org/prayer/index.html>.

281. See *id.*; THE BOY SCOUT HANDBOOK 129 (11th ed. 1998).

are sponsored by synagogues and churches.<sup>282</sup> Although admittedly not a religion, BSA is a religious organization in that it "has always been committed to the moral, ethical, and spiritual development of our youth."<sup>283</sup> If belief in a "Supreme Being" of some sort is sufficient to qualify as "religious training and belief,"<sup>284</sup> then the theistic requirement and focus of the Boy Scouts similarly qualify it as religious.

Few things are more private and intimate than religious faith. As the Supreme Court recognized in *Lemon v. Kurtzman*<sup>285</sup> and reaffirmed last Term in *Santa Fe*,<sup>286</sup> "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."<sup>287</sup> Scouting is such an institution. Matters of faith, such as spiritual education, are at the heart of First Amendment protection. Those who come together to share a common bond of theism do so under the protection of freedom of intimate association. Further, "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."<sup>288</sup> Thus the choice of parents to affirm their child's faith through the Boy Scouts' emphasis on theism and reverence should be protected under the freedom of intimate association. This protection should also extend to excluding those who disagree with the moral values taught by the Boy Scouts of America. As a religiously-oriented organization, BSA is arguably due significant deference in choosing its leaders.<sup>289</sup>

### 7. "Child Rearing and Education"

The fact that parents place their sons in the environment of a Boy Scout troop in order to instill in them traditional values

282. See Brief for Petitioners, *supra* note 26, at \*3.

283. BSA National Executive Board, Reaffirmation of the Position of the Boy Scouts of America on Duty to God, June 12, 1991.

284. *United States v. Seeger*, 380 U.S. 163, 165 (1965) (interpreting the statutory term "religion" broadly in the context of the conscientious objector provision of selective service registration).

285. 403 U.S. 602 (1971).

286. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

287. *Lemon*, 403 U.S. at 625.

288. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

289. For a broader discussion on the constitutionality of regulating the Boy Scouts' membership policies that draws from the organization's quasi-religious character, see Varcoe, *supra* note 224, at 248.

reinforces the Scout's claim of protection under the rubric of intimate association.<sup>290</sup> Parents and guardians have the right "to direct the upbringing and education of children under their control."<sup>291</sup> This includes choosing both their children's teachers and their subjects of instruction.<sup>292</sup> "Different parents have different ideas about upbringing, and seek out different organizations to assist them in the task of moral education."<sup>293</sup> Scouting is invested with a fundamental educational role in instructing growing boys in matters of good character, citizenship, and skill in the outdoors. *The Scoutmaster Handbook* inquires, "Is Scouting educational? You bet it is. Scouts have many opportunities to learn skills of leadership, of the outdoors, and of life."<sup>294</sup> Parents choose to enroll their sons in the Boy Scouts as much to expose them to the message and values promoted by BSA as to grant them the outdoor experiences Scouting offers.

Because the Scoutmaster "teach[es] the values of Scouting,"<sup>295</sup> the ability to control the selection of Scoutmasters and Assistant Scoutmasters is a matter of intense concern to BSA's members, their families, and sponsoring institutions. As the Justice Souter's concurrence last Term in *Troxel v. Granville*<sup>296</sup> addressed this issue. He noted that "[t]he strength of a parent's interest in *controlling a child's associates* is as obvious as the influence of personal associations on the *development of the child's social and moral character*."<sup>297</sup> Directly on point, Justice Souter added, "[w]hether for good or for ill, *adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school*."<sup>298</sup> By exercising control over its leadership the Boy Scouts are merely "reflect[ing] the expectations that Scouting families

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290. See, e.g., *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 265 (Cal. 1998).

291. *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925).

292. See *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923).

293. Brief for Petitioners, *supra* note 26, at \*42.

294. *THE SCOUTMASTER HANDBOOK* 7 (1998).

295. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 226 (Cal. 1998) (quoting the trial court).

296. 120 S. Ct. 2054 (2000).

297. *Id.* at 2067 (Souter, J., concurring) (emphasis added).

298. *Id.* (emphasis added).

have had for the organization."<sup>299</sup> BSA arguably provides adult social companions or teachers who indoctrinate children with the moral values those children's parents expect and choose. If the Boy Scouts of America was compelled to accept as a leader someone espousing different moral values, it would be unable to teach those values that it regards as essential to Scouting and that parents have come to expect from it.

Dale, it seems, would have the Boy Scouts replace parental preferences for its message with the State's preferences. In *Troxel*, Justice Souter concluded that it "would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent."<sup>300</sup> So it would not be any less "anomalous" here.

This argument hinges on the understanding that parents play an integral role in Boy Scouting. "When a boy becomes a Scout, his whole family joins the Scouting family."<sup>301</sup> From the beginning, parents are actively involved in their sons' Scouting experience. First, before a boy can even join the Boy Scouts, a parent must certify that he or she has read the parent's guide, a supplement in *The Boy Scout Handbook*.<sup>302</sup> All Scouting activities are open to parents, who are encouraged to participate in meetings.<sup>303</sup> Many of the adult leaders within a troop are "parents of Scouts."<sup>304</sup> Parents can occasionally substitute for registered adult leaders on trips and outings.<sup>305</sup>

In Cub Scouting, BSA's program for younger boys, parents actually approve rank advancement requirements.<sup>306</sup> Cub Scout activities are primarily done at home and signed off in the *Handbook* by the parent after his or her son has completed each task.<sup>307</sup> In Boy Scouting, Scoutmasters are encouraged to secure

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299. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2453 (2000) (quoting a 1993 BSA position statement).

300. *Troxel*, 120 S. Ct. at 2067 (Souter, J., concurring).

301. THE OFFICIAL BOY SCOUT HANDBOOK 428 (9th ed. 1979) (1985 prtg.).

302. See THE BOY SCOUT HANDBOOK 4 (11th ed. 1998).

303. See Brief for Petitioners, *supra* note 26, at \*3a-4a (quoting the Boy Scouts of America Information for Parents).

304. *Id.* at \*3a.

305. See *id.* at \*4a.

306. See, e.g., THE WOLF CUB SCOUT HANDBOOK 1-10 (1998).

307. See *id.*

parental involvement.<sup>308</sup> As *The Scoutmaster Handbook* notes, "[t]here is no end to what parents can do to support the program."<sup>309</sup> A Scout's parents are expected to help the troop in whatever capacity they can.<sup>310</sup> In sum, when a boy joins the Boy Scouts, "[e]very family member gets involved in Scouting [and] each of them is influenced by Scouting."<sup>311</sup>

#### IV. CONCLUSION

Justice Harlan once called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."<sup>312</sup> The 5-4 division in *Boy Scouts of America v. Dale* suggests that the scope of this freedom is anything but "beyond debate." Had the Court considered the affirmative aspects of the Boy Scouts' message on sexual morality, application of *Hurley* under the Free Speech Clause of the First Amendment might have brought greater consensus. Similarly, Justice Souter's concurrence in *Troxel* suggests that the Boy Scouts' intimate association argument should have been more seriously considered.

Nonetheless, at the end of the day, it must be recognized that few cases could stir as much emotion as *Boy Scouts of America v. Dale*. For the Boy Scouts and its supporters, this case was about the fundamental freedoms of speech and association, as well as its view of the moral shape of this country. Had the Boy Scouts lost, one might have wondered what would follow next. Would religious groups have had to "admit people of the other religion" or individuals who defied the faith's beliefs?<sup>313</sup> This

308. See THE OFFICIAL SCOUTMASTER HANDBOOK 48 (7th ed. 1981).

309. *Id.*

310. See *id.*; TROOP COMMITTEE GUIDEBOOK 37 (1990).

311. THE OFFICIAL BOY SCOUT HANDBOOK 428 (9th ed. 1979) (1985 prtg.).

312. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citations omitted).

313. Transcript of Oral Argument, *supra* note 133, at \*35 (question of a Justice). Similarly, one Justice wondered aloud:

I mean, supposing you have some of the kinds of organizations that Justice Breyer hypothesized: we're a Catholic organization and we just feel much more comfortable with Catholics, and we do Catholic work, or a Jewish organization. Now, they don't have any great message of—substantive message. Can they be required under a—if a public accommodations law such as New Jersey's is construed as broadly as

may not be a far-fetched scenario in light of recent events on several college campuses. The Student Judiciary at Tufts University voted to "derecognize" the Tufts Christian Fellowship for refusing to allow a practicing lesbian run for one of the group's officer positions.<sup>314</sup> There was a similar conflict at Middlebury College in Vermont when the leaders of a Christian fellowship discussed potential officers for the upcoming year.<sup>315</sup> These are private colleges; however, it is not clear that churches or religious groups would be constitutionally exempt from anti-discrimination statutes.<sup>316</sup> Although the Court has held that the Establishment Clause does not forbid the federal government from exempting religious organizations from anti-discrimination statutes,<sup>317</sup> it does not necessarily follow that the Free Exercise Clause mandates such a church exemption.

For Mr. Dale and his supporters the case was also about fundamental rights, particularly the right to be free from

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New Jersey's is, to take on non-Catholics, or non-Jews?

*Id.* at \*29; see also Brief for Amicus Curiae, Becket Fund for Religious Liberty at \*4, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at 2000 WL 228571; Brief for Amici Curiae, Christian Legal Society at \*8, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at LEXIS, 1999 U.S. Briefs 699; Brief for Amicus Curiae, Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America at \*9, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at 2000 WL 228621.

314. See John Leo, *Coercion on Campus: Tufts Evangelicals are Punished for Acting on Their Beliefs*, U.S. NEWS & WORLD REP., May 15, 2000, available at 2000 WL 7717941.

315. See Naomi Schaefer, *Houses of Worship: Campus Collisions*, WALL ST. J., June 16, 2000, available at 2000 WL-WSJ 3033222.

316. The Supreme Court declared in *Employment Div. v. Smith*, 494 U.S. 872 (1990), that individuals' rights to free exercise are not violated by "religion-neutral," generally applicable laws, even if those laws have the incidental effect of burdening religiously motivated conduct. See *id.* at 878-82. If the Boy Scouts were not protected by free speech or association, it seems difficult to see how a church's exclusivity could be protected under *Smith's* exception for "hybridized" rights, as they too would likely have no viable claim to free speech or association.

317. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). In *United States v. Ballard*, 322 U.S. 78 (1944), the Court prohibited inquiry into the "truth or verity of . . . religious doctrines or beliefs" but *not* into whether the defendants sincerely believe their alleged beliefs. *Id.* at 82. At least one commentator has suggested that under the Court's Establishment Clause jurisprudence "any administrative regime set up to determine when a religious association is discriminating would be liable to 'entangle' the government in the most intimate workings of the association." Varcoe, *supra* note 224, at 259 n.511 (citation omitted). To support this proposition he cites *National Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which construes the National Labor Relations Act so as not to apply to schools operated by churches, thus avoiding potential entanglement problems. See *id.* at 504-07.

discrimination. This is not a light argument and should not be treated as such. Nonetheless, just because BSA's message and method of disseminating it may be bigoted or prejudicial does not make it any less protected. As Justice Jackson once wrote for the Court, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."<sup>318</sup>

The Boy Scouts of America readily concedes that the underlying question of the morality of homosexual conduct is at least "controversial" and that "many people of good will believe that Scouting's position on the matter is misguided."<sup>319</sup> Similarly, the Justices in the majority made certain to note that they were "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."<sup>320</sup> Several of the dissenters also added that "[w]hether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights."<sup>321</sup>

Those who disagree with BSA have a protected right to make their view known. Moreover, they may and do use lawful means in an endeavor to persuade the Boy Scouts of America to change its position.<sup>322</sup> However, "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."<sup>323</sup> The New Jersey public

318. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

319. Brief for Petitioners, *supra* note 26, at \*46-47.

320. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2458 (2000).

321. *Id.* at 2479 (Souter, J., dissenting).

322. See, e.g., Associated Press, *supra* note 267 (suggesting that organizations would "gradually cut community ties with the Scouts" and noting that "several corporations, including jeans-maker Levis Strauss & Co." had already halted financial support of the Scouts); Associated Press, *Demonstrators Protest Supreme Court Ruling on Boy Scouts*, July 6, 2000, available at <http://www.cnn.com/2000/LAW/07/06/gayscoutprotest.ap/index.html> (reporting that "50 people demonstrated outside the Boy Scouts of America's [Baltimore] local headquarters to protest the organization's policy against gay Scout leaders").

323. *Boy Scouts*, 120 S. Ct. at 2458. As one commentator observed, although society and the Court may disagree with the Boy Scouts' view, the "First Amendment's protection of the freedom of conscience" creates a "sphere of private interaction into which the state cannot intrude . . ." *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 267 (2000).

accommodations law cannot be constitutionally applied to the Boy Scouts in this case. Perhaps one day BSA will change its view on the sexual implications of the Scout Oath and the Scout Law, but in a society that values freedom of thought, speech, and association, that must be left for the Boy Scouts alone to decide.

*John C. O'Quinn\**

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