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Dennis Amari

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# BOY SCOUTS MAY DISCRIMINATE AGAINST HOMOSEXUALS ON THE BASIS OF THE FIRST AMENDMENT RIGHT OF EXPRESSIVE ASSOCIATION

## BOY SCOUTS OF AMERICA v. DALE

530 U.S. 640 (2000)

### INTRODUCTION

After twelve years of otherwise “exemplary” service as a youth and adult member of the Boy Scouts of America (“BSA”),<sup>1</sup> James Dale’s membership in the Monmouth Council Boy Scouts organization was terminated in 1990 on the basis of his avowed homosexuality.<sup>2</sup> Dale challenged the dismissal claiming that the Boy Scout’s action violated New Jersey’s Law Against Discrimination (“LAD”) which prohibits discrimination in places of public accommodation on the basis of sexual orientation.<sup>3</sup> Throughout the litigation, the Boy Scouts asserted that allowing an avowed homosexual to retain his membership in the Scouts violated their First Amendment right to associate for expressive purposes.<sup>4</sup> When Dale’s case reached the state’s highest court, the Supreme Court of New Jersey held that the BSA is a place of public accommodation under state law and their dismissal of Dale on the basis of his sexual orientation violated that law.<sup>5</sup> Further they noted, that although the BSA does have a First

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1. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204 (N.J. 1999) (describing James Dale’s accomplishments as a boy scout and the Monmouth Council Boy Scout’s acceptance of his application to serve as an adult scoutmaster at age eighteen in 1989), *rev’d*, 530 U.S. 640 (2000).

2. See *Boy Scouts of Am.*, 530 U.S. at 644.

3. Law Against Discrimination, N.J. STAT. ANN. § 10:5-3 (West 1999).

4. See *Dale*, 734 A.2d at 1230.

5. See *id.* at 1228 (holding that there is no evidence in the record to show that one of the

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Amendment right to expressive association, admitting Dale did not violate that right.<sup>6</sup> By a narrow vote of 5-4, the United States Supreme Court took the opposite view, finding that New Jersey's LAD is contrary to the Boy Scouts' right to expressive association.<sup>7</sup> Since the decision was released in June 2000, BSA has received criticism for their policy, including legislation in Congress to revoke their federal charter.<sup>8</sup>

#### FACTS

James Dale first joined the Boy Scouts in 1978 at the age of eight, serving as a cub scout for three years.<sup>9</sup> He then became a boy scout in 1981, serving in three different troops over a seven-year period until he reached age eighteen in 1988.<sup>10</sup> Throughout this period, Dale received numerous merit badges, served in leadership positions, was admitted to special scout orders, and received among the highest honors that the Boy Scouts confer—the Eagle Scout Badge.<sup>11</sup> Shortly after ending his membership as a youth in the Scouts, Dale applied and was accepted for adult membership, and was appointed to the position of assistant scoutmaster of Troop 72 of the Monmouth Council scouting organization, a local New Jersey division of BSA.<sup>12</sup> It was during his sixteen months of service as an adult scoutmaster that Dale acknowledged his homosexuality to family and friends and became involved in a gay and lesbian student organization at Rutgers University where he had enrolled as an undergraduate.<sup>13</sup> Dale's sexual orientation became public when an article published in a New

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purposes of the BSA is to promote the view that homosexuality is immoral).

6. See *id.* at 1225 (indicating that there appeared to be no single views espoused by the Boy Scouts on the morality of homosexuality that served the purpose of providing “a unifying associational goal of the organization”). The Supreme Court of New Jersey therefore held that because the Boy Scouts do not associate for the expressive purpose of decrying homosexuality as immoral, “Dale’s expulsion constituted discrimination based solely on his status as an openly gay man.” *Id.*

7. See *Boy Scouts of Am.*, 530 U.S. at 659 (referring to New Jersey’s Law Against Discrimination as a “severe intrusion” on the Boy Scouts right of expressive association).

8. See 146 CONG. REC. 7448-55 (daily ed. Sept. 12, 2000) (detailing various legislative attempts to revoke the BSA charter and discussing some of the criticism Congress has made regarding the BSA policy).

9. See *Dale*, 734 A.2d at 1202 (discussing Dale’s fourteen years as a member of the Boy Scouts).

10. See *id.* at 1204.

11. See *id.* (describing the honor of receiving the Eagle Scout Badge as one that only three percent of all scouts receive).

12. See *id.*

13. See *id.* (noting that Dale eventually became president of the Rutgers University Lesbian/Gay Alliance).

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Jersey newspaper discussing a seminar on gay and lesbian teenage health issues pictured Dale and identified him as the co-president of the gay-lesbian student organization at Rutgers.<sup>14</sup>

Dale's membership in BSA came to an end soon thereafter presumably when leaders in the Monmouth Council saw the newspaper article identifying Dale as a homosexual.<sup>15</sup> Dale was informed by letter from an executive of the Monmouth Council organization, which had admitted him, merely that his membership in BSA had been terminated.<sup>16</sup> Dale wrote back to the organization requesting an explanation for his termination.<sup>17</sup> He was informed in a subsequent letter that his membership had been severed because Boy Scouts standards prohibit membership to homosexuals.<sup>18</sup> Dale subsequently pursued review of the Council's decision through the BSA regional and national organizations, and because he was not reinstated, he filed suit against BSA in 1992.<sup>19</sup> Dale's suit argued that his dismissal by BSA was a violation of the Law Against Discrimination, a New Jersey statute, which prohibits discrimination in places of public accommodation on the basis of sexual orientation.<sup>20</sup>

#### PROCEDURAL HISTORY

At the trial court level or chancery division, the court held that LAD did not apply to the Boy Scouts because BSA was not deemed to

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14. *See Dale*, 734 A.2d at 1205 (stating that Dale was merely in attendance at the seminar on psychological and health needs of homosexual teenagers and not attending in his capacity as co-president of the Rutgers University Lesbian/Gay Alliance). As described by the Supreme Court, the *Star Ledger*, the local New Jersey newspaper, while covering the seminar on the psychological and health needs of gay and lesbian youth, interviewed Dale "about his advocacy of homosexual teenagers' need for gay role models." *Boy Scouts of Am.*, 530 U.S. at 645.

15. *See Dale*, 734 A.2d at 1205 (timing the delivery of the letter to Dale severing his membership in BSA to the same month—July 1990—that Dale's picture appeared in the *Star Ledger* newspaper).

16. *See id.* (quoting from the letter to Dale from Monmouth Council Executive James W. Kay which granted Dale sixty days to request a review of the termination of his membership by a regional BSA review committee).

17. *See id.*

18. *See id.* (attributing the standard of the BSA's views on BSA's rejection of homosexuals from service in the organization to the leadership of the national BSA).

19. *See id.* (indicating that Dale also requested a copy of the BSA standards for leadership from the regional BSA organization but was never provided such information).

20. *See id.* (stating that Dale pursued the lawsuit because he believed the review of the national BSA would prove to be futile). *See generally* Law Against Discrimination, N.J. STAT. ANN. § 10:5-3 (West 1999) (prohibiting discrimination against persons by reason of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces, or nationality). This law not only applies directly to individuals, but also to a person's spouse, partner, member, employee, and various other persons related to an individual. *Id.*

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be a place of public accommodation and that, even if it were a place of public accommodation, it would meet the exception to the law for “distinctly private” activities.<sup>21</sup> Further it held that the Boy Scouts’ right to associate for expressive purposes as guaranteed by the First Amendment was violated due to BSA’s policy against homosexuality.<sup>22</sup> On appeal, the lower court decision was reversed.<sup>23</sup> The appellate court held that BSA is a place of public accommodation and revocation of Dale’s membership violated New Jersey’s LAD.<sup>24</sup> The court also held that BSA’s right to associate for expressive purposes was not violated because “BSA’s collective ‘expressive purpose’ is not to condemn homosexuality,” and that Dale’s membership “will not affect in ‘any significant way’” the views and activities pursued by BSA.<sup>25</sup>

BSA appealed the decision to the state’s highest court, the Supreme Court of New Jersey.<sup>26</sup> Like the appellate court, the state supreme court found that BSA is a place of public accommodation and that Dale’s dismissal by BSA violated New Jersey’s LAD.<sup>27</sup> As to BSA’s claim that its First Amendment right of expressive association is violated by LAD, the court dismissed such claim because “the statute does not have a significant impact on Boy Scout members’ ability to associate with one another in pursuit of shared views.”<sup>28</sup> Specifically, the court found that boy scouts do not associate to disseminate the belief that homosexuality is immoral, BSA discourages its leaders from providing scouts information on sexual issues, and that members and sponsors of BSA have different views on homosexuality.<sup>29</sup> The BSA petitioned the Supreme Court for a writ of

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21. *See Dale*, 734 A.2d at 1204 (rejecting, in addition, Dale’s common law claim that state policy opposes discrimination on the basis of sexual orientation).

22. *See id.* at 582 (concluding further that Dale was an active homosexual and that homosexual acts are immoral).

23. *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. App. Div. 1998) (affirming the lower court’s holding against Dale’s common law claim against BSA, but reversing on the claim that BSA violated New Jersey’s Law Against Discrimination).

24. *See id.* at 280-81 (relying on BSA’s open membership and its advertising and public promotion to conclude that the Boy Scouts come under the law’s definition of a place of “public accommodation”).

25. *Id.* at 288.

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

27. *See id.* at 1213 (identifying numerous activities, its membership structure, and other features of the Boy Scouts to support the holding that BSA is a place of public accommodation under the New Jersey statute).

28. *Id.* at 1223.

29. *See id.* (agreeing with BSA that it expresses belief in moral values and encourages the moral development of its members, but denying that BSA members associate to promote the view that homosexuality is immoral).

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certiorari on the belief that New Jersey's LAD does violate BSA's First Amendment right of association for expressive purposes; the Supreme Court granted certiorari in early 2000.<sup>30</sup> The case was argued on April 26, 2000 and a decision issued on June 28, 2000.<sup>31</sup>

### SUPREME COURT'S HOLDING

#### *BSA's Expressive Association Disapproves of Homosexuality*

The five-member majority opinion, written by Chief Justice Rehnquist, reversed the decision of the Supreme Court of New Jersey and held that LAD violates BSA's First Amendment right to expressive association.<sup>32</sup> The Court's holding is premised on the view that BSA has a right to associate for expressive purposes and that such expression disapproves of homosexual behavior and of homosexuals serving as members.<sup>33</sup>

Activities protected by the First Amendment, the Court's analysis begins, includes the right to association as set forth by the Court in *Roberts v. United States Jaycees*.<sup>34</sup> As described by the Court, the holding in *Roberts* provided that government actions that may unconstitutionally burden the freedom of association "may take many forms, one of which is 'intrusion into the internal structure or affairs of an association.'"<sup>35</sup> In addition, the Court notes that the right to expressive association, as set forth in *New York State Club Association, Inc. v. City of New York*,<sup>36</sup> protects against the forced inclusion of an unwanted person as part of a group; forced inclusion is considered an infringement upon the group's right to expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.<sup>37</sup> However, the Supreme Court notes that such freedom is not absolute and, as articulated by the Court in *Roberts*, freedom of expressive association can be overridden by regulations adopted to serve compelling state

30. See *Boy Scouts of Am. v. Dale*, 528 U.S. 1109 (2000).

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

32. See *id.*

33. See *id.* at 655 (contending that associations do not have to associate for the purpose of disseminating a specific message in order to receive protection under the First Amendment, but rather, their expressive association is protected so long as they engage in an expressive activity that could be impaired if such protection is not guaranteed).

34. 468 U.S. 609 (1984).

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

36. 487 U.S. 1 (1988).

37. *Boy Scouts of Am.*, 530 U.S. at 648 (citing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12 (1998)).

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interests that are unrelated to the suppression of ideas of the association if the state's interests cannot be achieved through means that are less restrictive.<sup>38</sup>

Turning to the issue of whether the Boy Scouts have a right to associate for expressive purposes, the Court reviewed the mission statement, oath, and law of the Boy Scouts and concluded that BSA does engage in expressive association.<sup>39</sup> For example, the Court notes, the mission statement of BSA is to instill values in young people, and a Scout vows to keep one's self "physically strong, mentally awake, and morally straight."<sup>40</sup> On the basis of these expressions and others, the Court concludes, "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive association."<sup>41</sup>

Although neither the mission, oath, or law of the Boy Scouts expressly mentions views on homosexuality or sexual orientation, the majority opinion states that BSA has asserted that homosexual conduct is not consistent with the oath's pledge to be morally straight.<sup>42</sup> This assertion by BSA, the Court contends, along with position statements issued by BSA's Executive Committee in 1978, and two later position statements issued after Dale's membership was revoked, are instructive as to BSA's policy on homosexuality. Also relying on the views of the Boy Scouts as expressed in previous cases,<sup>43</sup> the majority opinion concludes, "[w]e cannot doubt that the Boy Scouts sincerely hold [the] view," that homosexuality is not consistent with the Scout's mission, oath, or law, and that BSA teaches that homosexual conduct is not "morally straight."<sup>44</sup> The Court expressly rejects the holding of the Supreme Court of New Jersey that the exclusion of Boy Scout members on the basis of sexual orientation is inconsistent with BSA's commitment to diversity and representative

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38. *See id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

39. *See id.* at 650 (holding that the oath, mission and activities of the Boy Scouts indicate that the Scouts engage in expressive association).

40. *See id.* at 649 (citing the Boy Scouts' mission, oath, and law).

41. *Id.* The minority opinion, written by Justice Stevens, vehemently argues against the existence of any policy held by the BSA, prior to the Dale's suit, on its disapproval of homosexuality. *See id.* at 675 (Stevens, J., dissenting). "BSA fails to show that it ever taught Scouts that homosexuality is not 'morally straight' or 'clean,' or that such a view was part of the group's collective efforts to foster a belief." *Id.*

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

43. *See id.* (citing *Curran v. Mount Diablo Council of Boy Scouts of Am.*, No. C- 365529 (Cal. Super. Ct. July 25, 1991)).

44. *See id.* (holding that the "official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders" dates to a 1978 position statement signed by two BSA leaders).

membership.<sup>45</sup> “[I]t is not the role of the courts,” according to the Court, “to reject a group’s expressed values because they disagree with them or find them internally inconsistent.”<sup>46</sup>

The majority suggests that just as the Court must give deference to the nature of BSA’s expression, so too must it defer to BSA’s position on the inclusion of Dale in the organization would significantly affect Boy Scouts’ right to expressive association.<sup>47</sup> Rather than “erect a shield against antidiscrimination laws” by BSA’s assertions, the Court holds that BSA’s genuine desire not to promote homosexual conduct as a legitimate form of behavior would be significantly burdened by Dale’s presence as an assistant scoutmaster.<sup>48</sup> Contrary to BSA’s First Amendment protection of expressive association, Dale’s presence in the Scouts would “force the organization to send a message, both to young members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>49</sup>

The Supreme Court disagrees with the holding of the Supreme Court of New Jersey that the Boy Scouts’ ability to disseminate its message would not be significantly affected by the forced inclusion of Dale.<sup>50</sup> This is so, the Court notes, for the following reasons: (1) associations do not have to associate for the purpose of disseminating a certain message in order to be entitled to protection, but must merely engage in expressive activity that could be impaired; (2) the First Amendment protects BSA’s method of expression; and (3) not every member of a group must agree for the group’s policy to be considered association for expressive purposes.<sup>51</sup> As concluded

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45. *See id.* at 651 (analyzing the BSA’s views in the context of “reach[ing] ‘all eligible youth’”).

46. *See id.* at 651 (stating that precedent rejects the reasoning of the Supreme Court of New Jersey that the views of a group may be rejected because the court believes they are unwise or irrational).

47. *See id.* at 651. In dissent, Justice Stevens takes issue with the majority’s reliance on BSA’s assertions that its expressions provide evidence of opposition to homosexuality because, in his view, the record in this case does not. *Id.* at 2470. Justice Stevens writes, “I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further.” *Id.* at 2471 (Stevens, J., dissenting).

48. *See Boy Scouts of Am.*, 530 U.S. at 653 (suggesting that Dale’s status as co-president of the Rutgers University Lesbian/Gay Alliance and his posture as a “gay rights activist” would, if he remained in the Boy Scouts, send a message that is inconsistent with BSA’s views).

49. *Id.* The Court holds that even though BSA does not have to “trumpet its views from the housetops, or that it tolerates dissent within its ranks,” it is still entitled to protection under the First Amendment. *See id.* (discarding Dale’s assertion that the Boy Scouts do not revoke memberships of heterosexuals with contrary views to those of BSA on the grounds that Dale expresses more than contrary views as an avowed gay man and gay rights activist).

50. *Id.* at 653.

51. *See id.* at 654-55 (adding that even though BSA directs scoutmasters to avoid discussion of sexuality with scouts that make inquiries, BSA’s expression should be protected regardless of



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succinctly in the majority opinion, “[t]he Boy Scouts has a First Amendment Right to choose to send one message but not another.”<sup>52</sup>

*LAD Violates BSA’s First Amendment Right*

Having concluded that BSA does not have a right of expressive association with regard to homosexuality and that the inclusion of Dale as an assistant scoutmaster is contrary to that expression, the majority opinion examined whether the New Jersey LAD, protecting against discrimination on the basis of sexual orientation in places of public accommodation, violates BSA’s First Amendment right. The Court concluded the New Jersey LAD violated BSA’s rights and that to require BSA to accept Dale is indeed contrary to their First Amendment freedom of expressive association.<sup>53</sup>

The Court rebuked the lower court’s inclusion of a private organization such as BSA in the definition of a place of public accommodation, stating that the broadness of such a definition has increased the “conflict between state public accommodation laws and the First Amendment rights of organization.”<sup>54</sup> The Court differentiated its previous holdings in *Roberts*<sup>55</sup> and *Board of Directors of Rotary International v. Rotary Club of Duarte*<sup>56</sup> from its holding in this case, claiming that in these cases, the state had a compelling interest in ending discrimination against women in places of public accommodation. By contrast, in this case, enforcement of a state antidiscrimination does “materially interfere” with BSA’s views.<sup>57</sup> On the basis of “severe intrusion,” the Court held, “[t]he state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights of freedom of

this policy).

52. *Id.* at 656.

53. *See id.* at 655 (claiming that the Supreme Court of New Jersey erred in considering BSA to be a place of public accommodation rather than a private organization).

54. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (arguing that no attempt was made by the Supreme Court of New Jersey to relate the term “place” to a physical location when it included BSA such a place of public accommodation).

55. 468 U.S. 609 (1984).

56. 481 U.S. 537 (1987).

57. *See Boy Scouts of Am.*, 530 U.S. at 659 (suggesting that New Jersey’s Law Against Discrimination, unlike the state laws invoked in previous cases, “directly and immediately” affects associational rights). The Court proceeds to hold that the analysis to reach its conclusion in *Dale* is similar to that its used in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). *See id.* In *Hurley*, the Court held that the extending a Massachusetts public accommodation law to enable a gay and lesbian organization to participate in a parade did violate the First Amendment right of parade organizers. *Hurley*, 515 U.S. at 572. The holding of the Court in *Hurley* rested on the notion that the “choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.” *Id.* at 574-75.

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expressive association.”<sup>58</sup>

Concluding the majority opinion, Chief Justice Rehnquist rejected as a basis for its holding an intolerance of homosexuality in the face of greater social acceptance—a view suggested by the minority.<sup>59</sup> The majority opinion argued that the Court is not guided in its opinion by its own views of the correctness of BSA’s teachings on homosexuality but, rather, on the First Amendment free speech rights of BSA.<sup>60</sup>

#### AFTERMATH

On the basis of the Supreme Court’s decision and the Boy Scouts’ policy regarding homosexuality, the Boy Scouts have faced opposition from other public and private organizations that prohibit discrimination on the basis of sexual orientation.<sup>61</sup> For example, the City of Chicago has prohibited the Boy Scouts from using public city parks, schools or other public sites; the United Way of Fall River, Massachusetts has voted to withdraw its support for the Boy Scouts; and corporations such as Textron and Knight Ridder have terminated their support of the Boy Scouts.<sup>62</sup> Further, legislation was introduced in the U.S. Congress to revoke the federal charter of the Boy Scouts.<sup>63</sup> Debated unexpectedly in the House of Representatives on September 12, 2000, the federal legislation to revoke the Boy Scouts charter was defeated by a vote of 12-362.<sup>64</sup> Although there was

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58. *Id.* at 2457.

59. *See id.* at 2458. Justice Stevens’ dissenting opinion argues that the only “apparent explanation” for the majority’s view that Dale’s homosexuality infringed on BSA’s right of expressive association was 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.” *Id.* at 2476 (Stevens, J., dissenting).

60. *See id.* at 2458.

61. *See* 146 CONG. REC. 7450 (daily ed. Sept. 12, 2000) (statement of Rep. Woolsey) (describing actions by public and private organizations condemning the Boy Scout policy of discrimination on the basis of sexual orientation). Rep. Lynn Woolsey argued that opposition to the Boy Scouts’ position on homosexuality was not a “fringe movement,” but rather “part of a mainstream belief that intolerance in any form is un-American.” *Id.*

62. *See id.* (identifying an organization, known as Scouting for All, formed by a twelve-year-old scout from Petaluma, California, which opposes the BSA policy and has secured more than 53,000 signatures to support a change in the policy).

63. *See* Scouting for All Act, H.R. 4892, 106th Cong. (2000).

64. *See* 146 CONG. REC. H7521 (daily ed. Sept. 13, 2000) (recording fifty-one members of the House voting “present” because the legislation had not moved through the House in the customary manner). Because H.R. 4892 was brought up on the House floor by Republican Asa Hutchinson (Arkansas)—an opponent of the bill—with the apparent intent to embarrass supporters, namely House Democrats. *See* 146 CONG. REC. H7448 (daily ed. Sept. 12, 2000) (statement of Rep. Hutchinson). One commentary on the House vote argued that private organizations receiving public support should not be entitled to engage in discrimination. *Sexual Disorientation*, NEW REPUBLIC, Sept. 25, 2000 at 12. “The Boy Scouts can be private bigots or public citizens—but not both at once.” *Id.*

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strong sentiment expressed by legislators on the House floor as to the importance of the Boy Scouts to America society, Rep. Lynn Woolsey, author of the legislation, said she merely intended to send “a clear message that the civil rights movement is alive and well in the United States of America, and that this Congress does not support discrimination in any form.”<sup>65</sup>

The repercussions of this decision will continue to resound as debate endures in communities, public and private organizations, the halls of legislatures, and perhaps, in court sometime again. And if Justice Stevens is right, in stating that social acceptance of homosexuality is increasing, perhaps debate will also resume within the local organizations and hierarchy of BSA.

DENNIS AMARI

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65. 146 CONG. REC. H7450 (daily ed. Sept. 12, 2000).