

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 99–699

BOY SCOUTS OF AMERICA AND MONMOUTH
COUNCIL, ET AL., PETITIONERS v.
JAMES DALE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NEW JERSEY

[June 28, 2000]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and
JUSTICE BREYER join, dissenting.

I join JUSTICE STEVENS’s dissent but add this further word on the significance of Part VI of his opinion. There, JUSTICE STEVENS describes the changing attitudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender. The legitimacy of New Jersey’s interest in forbidding discrimination on all these bases by those furnishing public accommodations is, as JUSTICE STEVENS indicates, acknowledged by many to be beyond question. The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.

Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey’s law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. See *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984). BSA has disclaimed any

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argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA. See Tr. of Oral Arg. 12–13.

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

If, on the other hand, an expressive association claim has met the conditions JUSTICE STEVENS describes as necessary, there may well be circumstances in which the antidiscrimination law must yield, as he says. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position,

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*An expressive association claim is in this respect unlike a basic free speech claim, as JUSTICE STEVENS points out; the latter claim, i.e. the right to convey an individual's or group's position, if bona fide, may be taken at face value in applying the First Amendment. This case is thus unlike *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995).

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applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.