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Don’t Ask Us to Explain Ourselves, Don’t Tell Us What to Do: The Boy Scouts’ Exclusion of Gay Members and the Necessity of Independent Judicial Review

by Taylor Flynn

In the wake of the United States Supreme Court’s decision, Boy Scouts of America v. Dale, civil rights advocates may want to take heed of the Boy Scout motto “Be Prepared”—prepared to see antidiscrimination statutes rendered toothless in many instances. In an opinion authored by Chief Justice Rehnquist, the Court held by a five to four majority that the Boy Scouts of America is entitled to ban gay persons from membership despite New Jersey’s prohibition against sexual orientation discrimination. The Dale majority sharply departed from the Court’s long line of expressive association cases, in which the plaintiff in Dale as a cipher for gay sex, and by accepting

The Dale Court takes the model of a judiciary neutral with respect to the marketplace of ideas and distorts it into a judiciary powerless to accord sufficient weight to a state’s interest in protecting civil rights.

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it has rejected the claims of private clubs that application of civil rights laws to their membership policies violates their associational rights. Instead, the Dale Court ruled that Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston—which involved a quintessential speech claim concerning the right of a parade sponsor to exclude a contingent with whose message it disagreed—provided the relevant precedent.

In order to fit Dale into the Hurley mold, the Supreme Court accepted at face value the Boy Scouts’ blanket declaration that compliance with the nondiscrimination statute would violate the organization’s moral values. In so doing, the Supreme Court simultaneously asked and answered the central issue before it: Whether the admission of gay members is contrary to the Boy Scouts’ moral expression (and hence is constitutionally protected) or whether the Scouts’ ban stems from mere prejudice (and hence arises from precisely the type of unprotected hostility which the legislation was designed to eradicate). My disagreement with the Dale Court’s opinion lies not with the ultimate conclusion that courts may reach in such cases, but rather with the majority’s assertion that courts may not reach any independent conclusion at all.

In Part I of this Article, I argue that by “reading” the plaintiff in Dale as a cipher for gay sex, and by accepting
the Scouts’ claim of conflict without further inquiry, the Supreme Court takes the model of a judiciary neutral with respect to the marketplace of ideas and distorts it into a judiciary powerless to accord sufficient weight to a state’s interest in protecting civil rights. In Part II, I review evidence of the Boy Scouts’ moral expression and demonstrate that there are ample grounds to support the New Jersey Supreme Court’s conclusion that the Scouts’ exclusionary policy conflicts so directly with the organization’s expressed views that the ban is explainable only by animus. I conclude with a concern for future civil rights litigation: that a state’s nondiscrimination protections—particularly for groups not afforded heightened constitutional scrutiny—effectively may be eviscerated with nothing more than a potential excluder’s say-so.

I. AN ODD FORM OF INDEPENDENT REVIEW

When is opposition to a class of persons grounded in one’s moral views and when is it based simply on hostility? Is it even possible to harbor sheer enmity, devoid of ideological belief? While philosophers may wrestle with these questions, Supreme Court jurisprudence suggests that, at least for the purpose of constitutional interpretation, courts may characterize some acts of discrimination as grounded in nothing more than arbitrary dislike.9 If based on bare animosity, the Boy Scouts’ ban would be essentially devoid of social or expressive value and would not outweigh the state’s interest in combating discrimination—making the majority’s “odd form of independent review”10 the pivotal factor in the case.

A. EXPRESSION ASSOCIATION ANALYSIS

Prior to its decision in Boy Scouts of America v. Dale, the Supreme Court was faced on several occasions with the difficult question of whether the application of a civil rights law to a private organization’s membership policy violated the entity’s right of expressive association. The Supreme Court laid out its framework for analysis with respect to private clubs in Board of Directors of Rotary International v. Rotary Club of Duarte and Roberts v. United States Jaycees.11 In both Rotary and Jaycees, the defendant organizations had membership policies that specifically excluded women.12 In each case, the club claimed that application of a state’s antidiscrimination statute to its policy violated the members’ right of expressive association, and in each case, the Supreme Court rejected the defendant’s argument.13 First, the Supreme Court ruled that “public accommodations laws ‘plainly serv[ ] compeling state interests of the highest order,’”14 are unrelated to the suppression of ideas, and are the least restrictive means of achieving that compelling interest.15

Given that the state had a narrowly tailored, compelling interest in its civil rights law, the defendant was required to demonstrate that its expressive activities were substantially burdened. In Rotary, the Court asked whether inclusion of the banned group would force the organization to “abandon or alter” its expressive activities or would “affect in any significant way the existing members’ abilities to carry out their various purposes.”16 Similarly, in Jaycees, the Court asked whether inclusion of women “impose[d] any serious burdens”17 on the club’s shared goals and whether inclusion would “impede the organization’s ability”18 to engage in its expressive activities. In both cases, the Supreme Court concluded that any burden placed on the organization’s right of expressive association did not rise to the level of substantiality necessary to overcome the state’s interest in nondiscrimination.

The Supreme Court reached this conclusion after careful review of the clubs’ expressive activity and the degree to which this expression would be burdened by the inclusion of women. Both Rotary International and the Jaycees claimed that their restriction of membership to men was integral to their basic goals. Rotary stated that its organization was designed for “business and professional men,”19 and the Jaycees similarly specified that it served the interests of “young men.”20 In each case, the Court looked beyond the defendant’s bare assertion, even in its written membership policy, that the organization’s purpose was to serve the interests of men. Instead, the Court reviewed the evidence of the entities’ expressive activities as a whole: Rotary International’s efforts to “provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world,”21 and the Jaycees’ purposes to “inculcate . . . a spirit of genuine Americanism and civic interest . . . provide [an] opportunity for personal development and achievement . . . and to develop true friendship and understanding among young men of all nations.”22 The Court also examined each organization’s rationale for excluding women. Rotary International, for instance, asserted that it required all-male membership to “operate effectively” in foreign countries.23 Rather than automatically credit such rationales, the Court in each case looked to the organization’s wider expressive purposes and concluded that these purposes would not be substantially impaired by the admission of women.

Even though Boy Scouts of America v. Dale, like Rotary and Jaycees, involved the clash between a state antidiscrimination statute and a private club’s exclusion from membership of a statutorily protected group, the Dale majority’s discussion of these cases was abbreviated and conclusory. The Dale Court stated, “[w]e recognized in [Rotary and Jaycees] that States have a compelling interest in eliminating discrimination.”24 The Court then immediately attempted to distinguish Rotary and Jaycees by
stating, "in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express."\(^{29}\) Significantly, the Dale majority failed to mention that the Court had reached its conclusions in Rotary and Jaycees by refusing to accept the clubs' claims of impairment at face value.\(^{26}\)

In Dale, the Boy Scouts argued that their ban does not stem from hostility toward gay persons, but rather is based on their moral code: "Boy Scouting does not have an antigay policy, it has a morally straight policy."\(^{27}\) The Boy Scouts framed the issue by asking whether a court should dictate what the Scouts believe, arguing that "it is not the role of government to decide what a private organization's message is" and that "a reviewing court must give deference to [the Scouts'] characterization of [their] own beliefs."\(^{28}\) The Scouts similarly characterized the New Jersey Supreme Court's examination of the Boy Scouts' expression as the "reject[ion] [of] Boy Scouting's statements of its moral values and [the] substitut[ion] of the court's own definition of Scouting's moral message."\(^{29}\) This theme was echoed during oral argument, with members of the Court asking questions such as "[W]ho is better qualified to determine the expressive purpose and expressive content of the Boy Scouts' message, the Boy Scouts or the New Jersey courts?"\(^{30}\)

This depiction of the issue, I argue, plays on the semantic ambiguity of "determine." While a court cannot "determine" the Scouts' moral code, in the sense of prescribing its content, it is an essential role of the court to "determine," or find the facts. To be sure, it is not the role of a court to dictate what the elements of a party's moral beliefs should be. A court can no more order the Boy Scouts to believe that homosexuality is "morally straight" than it could tell the Ku Klux Klan to adopt a message of racial tolerance. But it is precisely the Court's role to determine whether a precept of the Scouts' moral views is that homosexuality is immoral. The Dale majority, however, concluded that the Supreme Court is affirmatively prohibited from determining whether there was evidence to support the defendant's claimed exemption from the civil rights law. Calling the evidence of the Scouts' moral viewpoint merely "instructive," Chief Justice Rehnquist chided the New Jersey Supreme Court for its review of the evidence, declaring that "it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent."\(^{31}\) Instead, based on a quote from the Boy Scouts' brief, the majority stated, "We accept the Boy Scouts' assertion [that the ban is based on their moral beliefs]. We need not inquire further."\(^{32}\)

Chief Justice Rehnquist's statements in Dale that the outcome of a claim may not turn on the court's view of the content of the message, and that an organization need not articulate its views with consistency or clarity to receive First Amendment protection, are simply an unremarkable recitation of free expression doctrine.\(^{33}\) In contrast, Rehnquist's declaration that the Supreme Court need look no further than the excluder's unsupported assertion that its policy is based on its moral beliefs is, as the dissent states, "an astounding view of the law."\(^{34}\) By refusing to consider whether there is a relationship between the entity's asserted moral basis for exclusion and the evidence of its moral views, the Court ignores the possibility that the excluder's morality claim is merely a litigation posture. Undertaking the individualized examination required by Rotary and Jaycees does not mean that the Dale Court inevitably would have concluded that there was no material impairment of the Boy Scouts' message. Assume that the Supreme Court had reviewed the Scouts' expression and determined that compliance with the statute would conflict with the entity's moral views. In such a case, I may have disagreed with the Court's interpretation of the facts. It is unlikely, however, that I would have been nearly as alarmed about the opinion's impact on civil rights laws—particularly for groups protected by statute but not afforded heightened constitutional scrutiny.\(^{35}\) Instead, the Dale majority has chosen an approach that appears to effectively disable courts from ensuring that an organization's violation of antidiscrimination law is grounded in its expression and is not simply a cover for the very type of hostility at which the legislation is aimed.

B. MORAL EXPRESSION OR MERE PREJUDICE?

The Dale majority's acceptance of the Boy Scouts' bald declaration that their violation of New Jersey's civil rights statute was based on their moral views may effectively render civil rights protections for many groups little more than hortatory. Equal treatment of most classes protected under antidiscrimination statutes, including those based on race, sex, sexual orientation, marital status and disability, have been or continue to be subject to morality-based objections. Most, if not all, of the groups commonly protected by antidiscrimination statutes have at some time been subject to moral condemnation. Less than 40 years ago, for instance, the trial judge in Loving v. Virginia ruled that "Almighty God created the races . . . placed them on separate continents . . . [and] did not intend for the races to mix."\(^{36}\) Women were consigned, as Justice Bradley wrote in Bradwell v. Illinois, by "the law of the Creator" to "the noble and benign offices of wife and mother."\(^{37}\) Marital status, too, has been a basis of moral disapproval: in the past, objections typically concerned the condemnation of divorce; today, the conflict more often takes the form of refusals to rent apartments to unmarried, cohabitating couples.\(^{38}\) There is likewise a long history of moral
opposition to persons with certain disabilities, whether it be the early belief that the mentally ill were demon-possessed or the modern-day declaration that AIDS is a punishment inflicted upon its sufferers for their "immoral behavior." The belief that African Americans should not marry Caucasians, or that women should not be lawyers—both once enshrined in the law as moral certainty—today are generally regarded as being grounded in mere prejudice. This evolution suggests that the line between "moral opposition" and "animus" can be thin indeed. Even the language that we use muddles the two. For instance, a person who says, "Gay people are bad" could be expressing moral disapproval, mere dislike, or both. Although the question of whether "pure" animosity can exist detached from any moral viewpoint is at some level unanswerable, one strand of the Supreme Court's equality jurisprudence suggests that the law views some discriminatory conduct as that which is undertaken for its own sake and which has no legitimate social value. In a line of cases including United States Department of Agriculture v. Moreno, City of Cleburne v. Cleburne Living Center, and Romer v. Evans, the Supreme Court—applying its most lenient standard of review, the rational basis test—has overturned laws upon finding that they were enacted based on hostility towards a class of persons.

In Romer v. Evans, for example, the Supreme Court struck down an amendment to the Colorado constitution ("Amendment 2") which nullified existing antidiscrimination protections for lesbians, bisexuals, and gay men and which prohibited the enactment of such laws in the future. The Court was faced with the issue of whether the Amendment's passage was based on a "bare . . . desire to harm" gay persons or was instead a legitimate attempt "to preserve traditional sexual mores." The state in Romer argued that Amendment 2 was enacted out of "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." The Supreme Court flatly rejected Colorado's argument; even under the highly deferential "rationality review" standard, the Court concluded, "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." I am not arguing that the Romer Court necessarily adopted the view that sheer animus is bereft of ideological content. Although Colorado claimed that it had an interest in protecting the associational rights of landlords and employers, the Court did not credit this rationale and hence did not undertake a First Amendment analysis. The Supreme Court also may take a darker view of actions motivated by animus when the actor is the state (as in Romer) rather than a private group (as in Dale): Given the constitutional guarantees of equal protection and free association, private citizens have far greater leeway to discriminate than does the government. Moreover, it was crucial to the majority's decision that Amendment 2 had the effect of denying gay men and lesbians the ability to use the normal political processes to protect themselves from discrimination. Nonetheless, the Supreme Court in cases such as Romer, Cleburne, and Moreno appears to contemplate a form of "pure" animosity that has no social or expressive value. In Romer the majority concluded its opinion by encapsulating the wrong of Amendment 2: 

"[It] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." Assuming this is a plausible reading of the Supreme Court's equality jurisprudence and applying it in the context of Dale, New Jersey would have an extremely strong interest in protecting groups even from private hostility, on the ground that bare animosity is not only useless but toxic as well.

The Boy Scouts appear to have capitalized on the court's difficulty in distinguishing between morality- and animus-based claims. Despite nearly twenty years of litigation, the Boy Scouts have not explained how their ban is related to their moral views other than to say that being gay conflicts with "traditional moral values." Counsel for the Boy Scouts opened his argument before the Supreme Court by claiming that Boy Scouting is "so closely identified with traditional moral values that the phrase 'He's a real Boy Scout' has entered the common language." Yet the Boy Scouts nowhere discuss what the phrase "traditional moral values" means to them, or how these values relate to homosexuality. They instead adopt an "it goes without saying" approach; because there is a long history of moral opposition to homosexuality, the Boy Scouts seem to imply, their ban on gay members must be based in morality. Crucially, though, the Boy Scouts overlook the fact that there is also a long history of hatred, violence, and state-sponsored discrimination against gay men and lesbians. As the party claiming an exemption from a civil rights statute, the Boy Scouts have not explained how their exemption from a civil rights statute, the Boy Scouts should at least be able to state why inclusion of gay members is incompatible with their set of values. Given the longstanding hostility towards gay men and lesbians, a court should (although the Dale majority did not) take seriously the possibility that the Boy Scouts' opposition could be grounded in antipathy.

C. WHAT ABOUT THE STATE'S INTEREST IN SAFEGUARDING CIVIL RIGHTS?

By allowing a blanket statement of "morality" to exempt excluders from a nondiscrimination statute, the Court in Dale ignores a state's numerous and weighty interests in the equal treatment of its citizens. Civil rights
laws are an attempt to address the myriad harms that flow from discrimination, such as job loss, emotional trauma, physical distress, decreased productivity, and disruption of family life. In particular, state and local governments are becoming increasingly aware of the enormous personal and social costs of discrimination against gay men, bisexuals, and lesbians. As of October, 1999, 11 states and more than 100 counties and municipalities had passed sexual orientation nondiscrimination laws. In light of this legislation, the Court’s discussion of antidiscrimination statutes in Dale is troubling. The majority’s disagreement with New Jersey’s substantive choices in enacting and interpreting its civil rights statute is unmistakable; the Court all but says that the state went too far:

New Jersey’s statutory definition of ‘a place of public accommodation’ is extremely broad. The term is said to ‘include, but not be limited to,’ a list of over 50 types of places . . . . But the statute also includes places that often may not carry with them open invitations to the public . . . . In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term ‘place’ to a physical location.

The majority seems to imply that the New Jersey Supreme Court must have erred in applying its statute to the Boy Scouts, as such a result had never been reached before: “Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. No federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result.” The Court’s patent disagreement with the statute’s application, a question of state law beyond its jurisdiction, raises the possibility that the majority may have altered the course of its expressive association cases to achieve the desired result, effectively gutting many statutory civil rights protections.

The majority’s opinion further suggests that any transformation rendered by its decision may not have been accidental. The Court’s discussion of antidiscrimination laws, especially when combined with questions posed by the Justices in oral argument, suggests that there may be a majority of the Court which believes that a state’s interest in prohibiting discrimination varies depending on the category of persons protected. If true, this approach arguably constitutes a departure from the Court’s prior expressive association jurisprudence. In Rotary, for instance, the Court—without qualification as to the category of persons protected—emphasized that “public accommodations laws ‘plainly serve compelling state interests of the highest order.’” Similarly, in requiring another private club to comply with a local gender nondiscrimination ordinance, the Court in New York State Club Association v. New York stated, “[I]t is relevant to note that the Court has recognized the State’s ‘compelling interest’ in combating invidious discrimination.

At oral argument in Dale, in contrast, several Justices asked whether the state’s interest varied depending on the classification of persons protected. For example, Chief Justice Rehnquist referenced a New York City ordinance prohibiting discrimination based on a person’s criminal record and asked, “But wouldn’t the State’s interest be weaker if we’re talking about, say, ex-convicts being discriminated against than it would about blacks being discriminated against?” In a footnote to the majority’s opinion, Justice Rehnquist notes in a tone bordering on the derisive:

Public accommodations laws have . . . expanded beyond those groups that have been given heightened equal protection scrutiny . . . . Some . . . have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology.

This position is an ironic one for Chief Justice Rehnquist, who typically urges citizens to go to the legislature rather than seek antidiscrimination protection in the Constitution.

If the Supreme Court were to adopt an approach in which the state’s interest in nondiscrimination depends on the category of persons protected, then the state’s interest in nearly every category covered by its antidiscrimination laws would be thrown into question. Only the categories of race (along with national origin and alienage), gender, and illegitimacy have thus far been determined to receive heightened constitutional scrutiny. This leaves a state open to an excluder’s claim that the state has only a weak interest in nondiscrimination prohibitions on a variety of other grounds, such as age, pregnancy, veteran’s status, disability, marital status, and sexual orientation. It is also conceivable that an excluder could assert that a hierarchy exists among categories unprotected by heightened review, which would make legislative choices vulnerable to a court’s subjective views on whether the prohibition against discrimination based on, say, pregnancy, is more or less weighty than the interest in protecting individuals regardless of age or disability. A state’s interest in ensuring equal treatment of gay men and lesbians would be particularly vulnerable to devaluation, given that sexual orientation protections remain the subject of heated debate.

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There is a strong argument, though, that a state’s interest in antidiscrimination is always due the utmost deference by a court because passage of a nondiscrimination statute represents a form of legislative fact-finding. By enacting a civil rights law, the argument runs, the legislature has determined that the specified forms of discrimination have no place in an arena deemed sufficiently public. It is a legislative command of equal treatment, and as such, constitutes a compelling state interest—one to which the judiciary owes deference.


The Supreme Court in *Hurley*, a case concerning the private sponsor of a Saint Patrick’s Day parade who refused to allow a lesbian and gay pride organization, the Irish-American Gay, Lesbian and Bisexual Group of Boston (“GLIB”) to march in the parade.

The Supreme Court struck down, as a violation of free speech, the application of a state antidiscrimination law to the parade organizers. The majority analogized James to GLIB, reasoning that:

As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of James as an assistant scoutmaster would just as surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs.

There are a number of flaws with the *Dale* Court’s reasoning. One is the majority’s failure to distinguish a pure speech claim from an expressive association defense, particularly in the context of statutory prohibitions against discrimination. In contrast to a pure speech claim, the right of expressive association is a correlative right that exists in order to protect First Amendment liberties; as a result, a defendant claiming a right of expressive association must affirmatively demonstrate the basis for her claim. In a separate dissent in *Dale*, Justice Souter—the author of *Hurley*—explained that in contrast to a claim of expressive association, a pure speech claim “if bona fide, may be taken at face value in applying the First Amendment.”

The parade in *Hurley* illustrates why it is important for courts to give greater “breathing room” to pure speech claims. Like a broadcast or a protest march, the parade was, rather than expressive association, a quintessential form of speech. The parade provided a time-limited opportunity for the marchers to communicate their point. As the majority stated in *Hurley*, in parades, “performers define ... what subjects and ideas are available for communication ... [by] marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”

The members of GLIB had wanted to participate in the parade in order to make a point: they desired to march behind a banner and distribute fact sheets, which conveyed that they were Irish, gay, and proud of both. In fact, GLIB had formed for the very purpose of expressing this message in the particular context of Boston’s Saint Patrick Day’s parade. The circumstance of an expressive association case is quite different: the possibility of excluding a member is a constant, on-going process. As Justice Stevens explained in his *Dale* dissent:

This is why a different kind of scrutiny must be given to an expressive association claim [than to a pure speech claim], lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission of some person as a member.

The majority in *Dale*, however, concluded that “Dale’s presence in the Boy Scouts would . . . force the organization to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior.” This conclusion rests on the Supreme Court’s faulty assumption that James’ “presence” (being gay) is all about sexual conduct. The majority fails to recognize either the vast complex of attributes that make up a person’s intimate attractions and romantic love or the shared experience of discrimination based on these attractions and loves. In the same vein, the majority characterizes James as a “gay rights activist,” presuming activism from James’ openness, outside the context of Scouting, about his sexual orientation. The only arguable evidence of activism was a newspaper article interviewing James in his position as co-president of his college’s gay student alliance in which he discussed his process of “coming out” as gay. As Justice Stevens pointed out, though, the article did not even “remotely suggest” that James would advocate any views on homosexuality to his troop.

The Court likewise refused to distinguish James’ personal beliefs about sexual orientation (that gay and nongay sexual orientations are equally worthy of respect) from the question of whether he would discuss these beliefs with troop members. James argued that he had not and would not discuss sexuality with members. In response, the majority stated that the Boy Scouts could select leaders who “teach only by example,” thereby simultaneously depicting James as the embodiment of sex and as the feared homosexual “recruiter” who can teach simply by being. At oral argument, counsel for the Boy Scouts similarly claimed that James, like the members of GLIB, carried a banner. James “put a banner around his neck” when his sexual
orientation became known to the Scouts, counsel declared, and "[h]e can't take that banner off."77 In dissent, Justice Stevens replied that "[u]nder the majority's reasoning," James' banner was "irreversibly affixed," and it read "'homosexual.'"78 By re-characterizing the Boy Scouts' exclusion of James as based on his expression rather than on his status, the majority effectively does an end-run around the principle that discrimination in itself is not protected expression.79

In one of many attempts to peel apart the Dale majority's equation of gayness with sexual activity and its advocacy, James presented evidence that the Boy Scouts do not require heterosexual Scout leaders who disagree with the policy to be banned from the organization. After noting that this evidence was contested, the majority declared that even if such differential treatment existed, it was "irrelevant" to the Court's analysis.80 According to the majority, James' sexual orientation made all the difference: "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."81

The Supreme Court made no attempt to explain the nature of this distinctive difference. If anything, inclusion of the heterosexual leader who supports gay rights and disagrees with the Boy Scouts arguably sends a stronger message, given that leader's open and direct disagreement with the ban. The majority also overlooked the fact that Scout leaders are instructed to refrain from discussing sexual issues within the troop and are told to direct the boys to their parents, teachers, or religious leaders.82 No evidence was presented, nor did the Boy Scouts argue, that James would violate this directive. As Justice Stevens noted in dissent, the Boy Scouts affirmatively encourage leaders to participate in civic and religious life, even though the organization is politically and religiously non-partisan: "[T]here is no basis for [the Boy Scouts] to presume that a homosexual will be unable to comply with [their] policy not to discuss sexual matters any more than it would presume that politically or religiously active members could not resist the urge to proselytize or politicize during troop meetings."83

Given the absence of any suggestion that James would be likely to violate the Boy Scouts' prohibition against discussing sexuality within the troop setting, it seems inescapable that the Supreme Court's decision was based not on anything James might say or do but on who he is. The majority's reasoning not only permits the Court to avoid the application of the civil rights statute, but may have even greater repercussions. Recalling another ignominious chapter of the Supreme Court's history by evoking Plessy v. Ferguson,84 the Dale dissent suggested that the Court is similarly constitutionalizing discrimination here. "Though unintended," the dissent stated, the majority's reliance on James' openness as a gay man to justify his exclusion "is tantamount to a constitutionally prescribed symbol of inferiority."85

II. THE BOY SCOUTS' BAN: A REVIEW OF THE EVIDENCE

The United States Supreme Court accepted, on its face, the Boy Scouts' claim that their ban on gay members was based upon the organization's moral views. The Court did not attempt to determine whether the ban was consistent with evidence of the Scouts' moral expression.86 A sampling of what the evidence might look like appears below.87 I do not undertake this review to argue that the Boy Scouts' ban is necessarily based on hostility, but for the more limited purpose of illustrating that, had the Court carried out the analysis required by the Jaycees-Rotary line of cases, there was overwhelming evidence to support the New Jersey Supreme Court's conclusion that the ban collides so directly with the Scouts' moral teachings that the only possible basis for the ban is animus.

A. THE SCOPE OF THE BAN

In spite of having litigated a number of suits filed by expelled gay Scouts over the past two decades,88 the Boy Scouts have left the scope and content of their policy banning gay members impossibly vague. In fact, the Boy Scouts have never mentioned the words "homosexuality" or "gay" in any of their manuals, handbooks, or guides directed to either Scout leaders or youth members.89 Nor have they stated in these materials that they have a policy of barring members who are gay, which led Justice Souter to remark that the policy appeared to be a "sort of Boy Scout common law."90 Determining the contours of the Scouts' policy requires sifting through several sources of information and then piecing the fragments together. The first two sources of information consist of the Boy Scouts' written materials and what they have done in practice—the known occasions on which the Boy Scouts have banned gay members. The third source concerns what the Boy Scouts say they would do in various situations posed by the Justices at oral argument in Dale. The responses to these hypotheticals provide what appears to be the most detailed evidence of the Boy Scouts' policy to date.

The Boy Scouts argue that the inclusion of gay members in the organization is contrary to the Scout oath and law.91 There is no doubt that the Scouts hold out to their members the oath and law as the basis for their moral code. The Boy Scout Handbook ("Scout Handbook") explains that the oath and law embody "[t]he principles of the Boy Scouts of America" and states that a boy "will be
expected to live by these standards [as] a Boy Scout." As one of the first requirements for advancing in the Scout ranks, a boy must recite the Scout oath and law from memory, as well as explain their meaning "in [his] own words." In taking the oath, a Scout pledges to "do [his] best to do [his] duty to God and [his] country and to obey the Scout law: [t]o help other people at all times; [t]o keep [himself] physically strong, mentally awake, and morally straight." The Scout law provides that a Scout is "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." As grounds for their ban, the Boy Scouts point in particular to the provisions of the oath and law which state that a Scout must be "morally straight" and "clean."

Given the Boy Scouts' requirement that members learn and understand the meaning of the oath and law, it is not surprising that the Scout Handbook explains the "morally straight" and "clean" provisions to the boys. What is surprising, however, are the explanations themselves, both in their content and for their silence. Much of their substance is arguably antithetical to the Boy Scouts' ban on gay members. For instance, the explanation of "morally straight" states that a Scout "should respect and defend the rights of all people" and that his "relationships with others should be honest and open." The Scout Handbook's section on being "clean" states that "[t]here's another kind of dirt . . . that can't be scrubbed away," giving as examples "jokes that make fun of ethnic groups or people with physical or mental limitations" and "racial slurs."

The Scout Handbook's explanations of the "morally straight" and "clean" provisions are also notable for what they do not say. Neither passage refers to sexuality, much less homosexuality. The Boy Scouts argue that they are not required to set forth a list of what is not "morally straight" or "clean" in order to be exempted from antidiscrimination laws. This may be correct, but it is beside the point: the Scouts devote an entire section, entitled "Sexual Responsibility," to discussing a boy's sexual relationships. Despite having consistently based their claim for exemption on a purported link between being "morally straight," "clean," and heterosexual, the Boy Scouts have never revised the Scout Handbook to make the link explicit. Nor does the Scout Handbook tell the boys that the terms "morally straight" and "clean" have anything to do with sexuality at all. These inconsistencies between the evidence and the Scouts' litigation position provide strong grounds for the New Jersey Supreme Court's determination that the Boy Scouts' ban is indistinguishable from animus.

In addition to invoking the "morally straight" and "clean" provisions of the Scout oath and law, the Boy Scouts' argument relies on position statements that they drafted in response to litigation. A Boy Scout member would have had only one opportunity, in the past two decades of litigation, to read in Scout literature about the ban: in an article published for adult members in a 1992 issue of the Boy Scout leaders' magazine. Apart from the 1992 statement, the Scouts have issued four similar statements, which were sent only to the Boy Scouts' public relations officials. These do little to illuminate the substance of the Scouts' ban on gay members. Probably the most complete explanation is found in a public relations statement from 1991, yet it consists of no more than the conclusory assertion that being gay conflicts with their moral expression: "We believe that homosexual conduct is inconsistent with the requirement . . . that a Scout be morally straight and . . . clean . . . [based upon] our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs." Thus, even the Boy Scouts' most complete statement of their policy is nothing more than a reiteration of their "because we say so" approach. Moreover, even assuming that these position statements had articulated why homosexual conduct is "inconsistent" with the Scouts' moral code, the statements' inaccessibility to members suggests that they may not reflect the message actually conveyed to its members by the organization.

A source to which the Boy Scouts point in support of their ban against gay members is the fact of litigation itself. While there have been numerous lawsuits challenging the policy, this litigation has done little to clarify the terms or scope of the Boy Scouts' policy. Neither the issues nor the factual scenarios raised in the litigated cases have differed much from one another: they involve the exclusion of an adult member whom the Scouts learned was gay. In their arguments, the Boy Scouts make numerous references to past litigation, as when counsel for the Boy Scouts concluded his Supreme Court argument by noting that "we've been in litigation on this precise issue for the last 19 years." Although not clearly articulated, the gist of the Boy Scouts' reasoning appears to be that, if they have been fighting over this issue for so long, their moral opposition must be sincere and strongly held. While that is one possible conclusion to be drawn from the time, money, and passion which the Boy Scouts have doubtless expended, the same evidence points to another conclusion as well: the possibility that the Boy Scouts' energies have been fueled by animosity.

The final source of information concerning the contours of the Boy Scouts' policy consists of the answers that counsel for the Scouts provided to the Justices' questions during oral argument. At oral argument, the Justices repeatedly called the Boy Scouts' policy "confusing," and they devoted many questions to simply attempting to determine what, exactly, constitutes the Scouts' policy. The primary aim of their questions
appeared to focus on determining whether the ban is based on a member's conduct, status, expression, or some combination thereof. One of the Justices, for example, asked, "Are you saying the policy is don't ask, don't tell, or is the policy, if you are gay, you are not welcome in the Boy Scouts? Which is it?"\textsuperscript{10} The Justices also asked, "What about the heterosexual Scout leader who openly espouses the view that homosexuality is consistent with Scout law and oath . . . ?"\textsuperscript{111} "[W]hat if someone is homosexual in the sense of having a sexual orientation in that direction but does not engage in any homosexual conduct?"\textsuperscript{112} "Does that go for [heterosexual] cohabiters also?"\textsuperscript{113}

The result is a patchwork of answers, some of which appear to fit together and many of which clash outright. Counsel for the Boy Scouts claimed that the policy is based on "expression and conduct . . . not . . . status."\textsuperscript{114} Yet when asked whether James would have been banned if he had been a heterosexual advocate for gay rights in identical circumstances, counsel's response was that a heterosexual in the same situation would not necessarily have been expelled: "[I]t would be open to the Scouts to conclude that somebody who is himself presenting a personal example [by being gay] . . . might be more unacceptable than somebody [heterosexual] who was merely advocating."\textsuperscript{115} A further indication that the policy is based on the mere fact of a member's sexual orientation is counsel's statement that even if an openly gay Scout agreed to remain celibate, the member would be barred because "being openly homosexual . . . communicates the concept that this is okay."\textsuperscript{116} Another aspect of the policy revealed during oral argument is that, similar to the United States' military policy,\textsuperscript{117} the Boy Scouts "don't ask" if a member is gay, but they will ban him from the organization regardless of who "tells." Unlike the military's policy, however, the Boy Scouts do not state in any materials available to applicants that they expel gay members.\textsuperscript{118} Lastly, the oral argument disclosed that there are two ways in which a gay member may remain in the Scouts. The first is if the Boy Scouts are unaware of a member's sexual orientation, since "[t]he policy is not to inquire."\textsuperscript{119} The second is the only option for a gay member whose sexual orientation becomes known to the Scouts and who promises to be celibate: he can remain in the organization on the (literally) demoralizing condition that he affirmatively tell the other members that being gay is immoral.\textsuperscript{120}

**B. EVIDENCE OF THE BOY SCOUTS' MORAL CODE**

Although documentation of the Boy Scouts' exclusionary policy is scant, evidence of their overall moral code is abundant. As they explain in one of their leader's guides, the Boy Scouts incorporate games and projects into Scout meetings that are designed to help the boys learn basic social and moral precepts, such as learning "to follow rules, to take turns, to respect the rights of others, to give and take, and to play fair."\textsuperscript{121} The Boy Scouts' guides, manuals, and handbooks provide a rich source of materials to aid a court in determining whether the ban is consistent with their moral expression. The three values which the Boy Scouts name as the underpinning for their moral views are "honesty," "fairness," and "respect for others."\textsuperscript{122} Central to the Scouts' commentaries on fairness and respect for others are the principles of equal treatment and inclusiveness. In the leader's guide, **Making Ethical Decisions**, the Boy Scouts explain "fairness": "To treat someone unfairly is to say, 'You don't have the same rights as others.' Unfairness is treating one person worse than others for no good reason, as occurs in various sorts of discrimination."\textsuperscript{123} In another leaders' guide, the Boy Scouts define "discrimination" in a way that would directly apply to their ban on gay members, as "[k]eeping someone from something they want to do or join because they belong to a certain group."\textsuperscript{124} The Boy Scouts similarly discuss "respect for others" largely in terms of accepting differences among people\textsuperscript{125} and they caution boys not to use status-based characteristics to form judgments about people or as a basis for unequal treatment.\textsuperscript{126}

Significantly, one of the status-based categories for which the Boy Scouts urge respect is "sexuality," a term that a court could easily determine encompasses homosexuality. Indeed, given the context in which the word is used -- a statement in **The Scoutmaster Handbook** that it is the leader's responsibility to "steer Scouts away" from any "forms of negativity that denigrate people based upon their gender or sexuality"\textsuperscript{127} -- it is difficult to imagine that the Boy Scouts could have meant "sexuality" in any sense other than "homosexuality." If "sexuality" is so interpreted, then the Boy Scouts have actually included respectful treatment of gay people as part of their moral values.

In their discussions of fairness and respect, the Boy Scouts often refer to the importance of antidiscrimination laws. For instance, one leader's guide states, "even though it is part of the American way . . . to talk about 'equality for all,' old attitudes have not always kept pace with the newer laws that guarantee civil rights."\textsuperscript{128} One of the Boy Scouts' suggested activities is to "[l]ead a discussion on the rights of Scout-age youth—including the right . . . to inform authorities if someone is being treated unjustly [and] to use public facilities on the same basis as all other citizens."\textsuperscript{129} The Boy Scouts even acknowledge that compliance with the law can sometimes be burdensome. In fact, they suggest that leaders explicitly recognize this burden in their discussions with the boys and point out that the burden is outweighed by society's interest. **Making Ethical Decisions** states that "[t]he important point for young people to learn is that, though fairness and restraint may not make them
‘best off,’ they will be better off than in a society where there are no rules constraining [their] actions.”

The Boy Scouts’ discussions of “honesty” stress the importance of being open with others about oneself. For instance, the “morally straight” provision of the Scout oath explains to boys that “your relationships with others should be honest and open.” Similar to the military’s “Don’t Ask; Don’t Tell” policy, persons who successfully conceal their sexual orientation are permitted to remain in the organization. As some courts have concluded in the military context, such a policy discourages people from being honest with others about their sexual orientation and may encourage gay members to lie about themselves and their lives. The policy also encourages gay members, in opposition to the Boy Scouts’ moral tenet of openness, to keep their personal lives shrouded in secrecy.

The Scouts’ ban is arguably inconsistent with another aspect of their moral code: their assertion that homosexuality itself is immoral. If the Boy Scouts believe that gay people are immoral, then it is surprising that they would knowingly allow closeted gay men to be Scout leaders. There is no evidence to suggest that a person who conceals his sexual orientation will be more “moral” than one who is open; indeed, the converse may be true. The Boy Scouts could argue that they exclude gay leaders not because the leaders are gay, but because of the “message” that being gay sends: If no one knows that a particular leader is gay, then no message is being sent. As Justice Souter observed at oral argument, though, no plaintiff “is using the Boy Scouts ... for expression.” Furthermore, during the Supreme Court argument, counsel for the Scouts made no distinction between being an openly gay Scout and discussing sexual orientation at Scout meetings. Invoking Hurley, counsel stated that James had a permanently affixed banner around his neck. If the Boy Scouts’ claim for an antidiscrimination exemption was based on their belief that gay people are immoral (rather than on hostility), one might expect the Scouts to take all feasible steps to ensure that no gay person acts as a Scout leader. The Boy Scouts, however, do not even take the simple steps of asking applicants for leadership positions whether they are gay, or of including a statement in their manuals which explains their view that being gay is incompatible with being a Scout.

1 In a final twist, despite their emphasis on role-modeling, the Boy Scouts state that they will allow an openly gay man to be a leader on the condition that he tell the boys that his homosexuality is immoral. This imposed condition runs headlong into other Boy Scout values. In the pamphlet that boys must read to get their “Family Life” merit badge, for example, the Boy Scouts emphasize the importance of self-esteem: “People who feel good about themselves help make the family secure. In contrast, troubled family members with low self-esteem may be distrustful and suspicious of others.” If openly gay members are allowed to remain in the organization only if they stand before the group and forswear their sexual orientation, to hold themselves up as an example of what not to be, this would be entirely consistent with an animus-based policy. It is unclear which would be more punishing to a Scout member, being expelled from the organization or submitting to public humiliation and repudiation before his peers and charges. It is only by the thinnest technicality that the latter could be construed as “acceptance” of a gay member combined with the simultaneous rejection of his “message.”

III. CONCLUSION

The Supreme Court’s opinion in Dale is in part a Bowers redux. By adopting the Boy Scouts’ characterization of its ban at face value, the Court effectively has assumed (with some outer boundary of impermissible state action demarcated by Romer), that discrimination against gay men, lesbians, and bisexuals is presumptively justifiable. Under this reading of Dale, the Court need not independently review the facts to weigh competing interests—even though the countervailing consideration is the prevention of the very discrimination at issue. The Court’s approach threatens not only discrimination protections for gay persons, but protections for other groups as well. Especially vulnerable are classifications that have not been afforded heightened constitutional scrutiny and to which moral objections have been made, such as cohabitating couples or persons diagnosed with HIV/AIDS. Nor is the Dale majority’s approach necessarily limited to the context of private clubs: other organizations subject to public accommodations statutes, such as some landlords and employers, could argue that their moral beliefs are violated by compliance with the law. By emphasizing the majority’s flawed reasoning in Dale, civil rights advocates hopefully can cabin the decision’s effect and safeguard the states’ interest in protecting civil rights.

NOTES

This article frequently refers to the Boy Scouts of America as the “Boy Scouts” or “Scouts.” While the Boy Scouts of America is a single organization, in common parlance the term “Boy Scouts” is often treated as if it were a plural noun, a usage which this article adopts.

The New Jersey Supreme Court determined, as a matter of state law binding on the United States Supreme Court, that the Boy Scouts of America is sufficiently public to render it subject to New Jersey’s civil rights act. See Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999). Whether this decision was correct as a legal matter, or is a normatively desirable result, is beyond the scope of this article. See infra notes 11-23.


In Part II of this Article, I review the evidence of the Boy Scouts’ moral views. I do not conclude that the Boy Scouts’ ban is necessarily based on sheer animosity, but instead argue that the New Jersey Supreme Court did exactly what it was required to do: it compared the Boy Scouts’ blanket statement that the admission of gay members conflicted with their moral views with the evidence of those views. See infra notes 41-43.

The Dale dissent used this phrase to describe the majority’s adoption, without further inquiry, of the Boy Scouts’ claim that their ban on gay members is grounded in their moral beliefs. 120 S. Ct. at 2471 (Stevens, J., dissenting).


Rotary, 481 U.S. at 541; Jaycees, 468 U.S. at 613.

Rotary, 481 U.S. at 545-49; Jaycees, 468 U.S. at 623.

Rotary, 481 U.S. at 549 (quoting Jaycees, 468 U.S. at 624).

Rotary, 481 U.S. at 548-49; Jaycees, 468 U.S. at 626, 628.

481 U.S. at 548.

468 U.S. at 626.

Id. at 627.

481 U.S. at 627.

481 U.S. at 627.

481 U.S. at 639.


481 U.S. at 541.


Id.

See supra notes 11-23.


Id. at 25-26.

Id. at 17.

Transcript of Proceedings, April 26, 2000, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), at 17 [hereinafter Transcript], available in Lambda Legal Defense and Education Fund Presskit, at www.lambdalegal.org/sections/sections/dalepresskit/transcript. html (copy on file with journal). Justice Scalia similarly commented, “I don’t know why we have any power to question it if the leadership of the organization says . . . that one of the elements of . . . moral formation is that they think homosexuality is immoral.” Id. at 16.


Id. at 2453.


Dale, 120 S. Ct. at 2471.

For a discussion of the threat posed to groups that are protected by statute but are not afforded heightened constitutional scrutiny, see infra at Parts I.B. and I.C.

Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting and reversing trial court decision which had upheld ban on interracial
marriage).

37 Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (upholding the exclusion of women from the practice of law).

38 See, e.g., Smith v. Fair Employment & Hous. Comm’n, 913 P.2d 909 (Cal. 1996) (upholding application of state fair housing statute that prohibits marital status discrimination to landlord whose religious beliefs dictate that it is sinful to rent to an unmarried couple).


40 See, e.g., Josephine Gittler and Sharon Rennert, HIV Infection Among Women and Children and Antidiscrimination Laws: An Overview, 77 IOWA L. REV. 1313, 1325 (1992) (discussing national opinion surveys in which a significant minority of respondents opposed health care for persons with AIDS based on belief that the illness was a punishment for immoral behavior).

41 United States Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973) (striking down congressional legislation as violating Equal Protection Clause’s rationality review standard because enacted out of animosity toward “hippies”).

42 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating zoning ordinance as violating rational basis standard of Equal Protection because it was enacted out of fear and dislike of the mentally disabled).

43 Romer v. Evans, 517 U.S. 620 (1996) (striking down amendment to the Colorado constitution as a violation of the Equal Protection Clause’s rationality review standard because it was enacted solely out of a desire to harm gay men, lesbians and bisexuals).

44 Id.

45 Id. at 634 (quoting Moreno, 413 U.S. at 534).

46 Id. at 636 (Scalia, J., dissenting).

47 Id. at 635.

48 Id.

49 Id. at 635 (stating that “[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.”).

50 See, e.g., id. at 627 (calling effect of Amendment 2 “sweeping and comprehensive” because gay persons, “by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres”); see also id. at 633 (stating that “[a] law declaring in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).

51 Id. at 635. See also id. at 632 (concluding that Amendment 2 served no legitimate state interest because it “seems inexplicable by anything but animus toward the class it affects.”).

52 See, e.g., Transcript, supra note 30, at 1. For a more detailed discussion of the ways in which the Boy Scouts fail to clarify what their policy is and how it appears to conflict with particular values they hold, see infra at Part II.

53 Id.


56 Id. at 2456 n.3.


58 487 U.S. 1, 14 n.5 (1988).

59 Transcript, supra note 30, at 14. One of the Justices likewise asked, “Now supposing New Jersey were to pass a law like that. At some point, the compelling state interest is considerably dissipated, isn’t it?” Id. at 13.

60 Dale, 120 S. Ct. at 2456 n.2 (internal citations omitted).

61 See e.g., Bowers v. Hardwick, 478 U.S. 186, 194-96 (1986) (warning against dangers of expansively reading the Constitution and emphasizing that the expansion or curtailment of rights should rest predominantly with the legislature).

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Dale, 120 S. Ct. at 2454.

See Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (stating that the right to associate is recognized "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."); id. at 622 (describing right of expressive association as a "correlative freedom"); See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (stating that the First Amendment "implies a corresponding right to associate.") (quoting Jaycees, 468 U.S. at 622).

Dale, 120 S. Ct. at 2479 (Souter, J., dissenting).

515 U.S. at 568 (quoting, in part, S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986)).

Id. at 570.

Id.

Dale, 120 S. Ct. at 2476 (Stevens, J., dissenting).

Dale, 120 S. Ct. at 2454.

Id. at 2449.

Id.

Id. at 2473-74 (Stevens, J., dissenting).

Id.

Dale, 120 S. Ct. at 2455.

Transcript, supra note 30, at 11.

120 S. Ct. at 2476 (Stevens, J., dissenting).

See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (stating that "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy").

120 S. Ct. at 2455.

Id.

Dale, 120 S. Ct. at 2473 (Stevens, J., dissenting).

Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding state-sponsored segregation and rejecting the argument that "enforced separation of the two races stamps the colored race with a badge of inferiority").

Dale, 120 S. Ct. at 2476 (Stevens, J., dissenting).

See supra notes 24-32 and accompanying text.

Most of the evidence which I discuss was before the Court in Dale; that which was not before the Court is readily accessible and could easily have been introduced in any of the numerous litigation challenges to the Boy Scouts' ban.


Dale, 120 S. Ct. at 2461-63 (Stevens, J., dissenting). See also Transcript, supra note 30 at 5.

See, e.g., Transcript, supra note 30, at 5.

See, e.g., Petitioner's Brief, supra note 27, at 3-4.

SCOUT HANDBOOK, supra note 2, at 45.

Id.

Id.

Id. at 47.

Petitioner's Brief, supra note 27, at 5-7. While the Boy Scouts do not claim that "straight" means "heterosexual," that evocation seems to have conveniently inured to their benefit. See, e.g., Transcript, supra note 30, at 9 (asking "if homosexual conduct violates the Scout code, being straight and so forth") (emphasis added).

SCOUT HANDBOOK, supra note 2, at 46.

Id. at 53. See infra at Part II.B. for a discussion of the ways in which the Boy Scouts' emphasis on honesty and respect for others conflicts with their ban on gay members.

Id. at 46, 53.

Petitioner's Brief, supra note 27, at 3 (stating that the oath...
and law "provide a positive moral code... they are a list of ‘do’s’ rather than ‘don’ts,’ setting forth affirmative character traits").

101 SCOUT HANDBOOK, supra note 2, at 376-77.

See, e.g., Petitioner's Brief, supra note 27, at 5-6.

102 See supra note 88.

103 Transcript, supra note 30 at 5.

Petitioner's Brief, supra note 27, at 5 (discussing statements sent to "Scout officials who might be asked to articulate Boy Scouting's position"). They are dated March 1978, June 1991, May 1992, and January 1993. Id. at 5-6.

Id. at 5-6.

See supra note 88.

Id.

Transcript, supra note 30, at 22.

See, e.g., id. at 2-3 ("[W]here do we look, though, to determine what the policy is, because it is a little confusing."); and id. at 4 ("I don’t understand what is the Boy Scouts’ policy, and I think we've all asked about that.").

Id. at 2.

Id. at 3.

Id.

Id. at 4.

Id. at 2.

Id. at 7.

Id. at 4.

The United States’ military policy which mandates the termination of a servicemember of the armed forces for engaging in same-sex conduct, often referred to as “Don’t Ask; Don’t Tell,” is codified at 10 U.S.C. § 654(b).

See supra notes 92-101 and accompanying text. This holds true unless the applicant somehow manages to track down the position statement from the 1992 magazine article, see supra text accompanying note 103.

Transcript, supra note 30, at 2.

Id. at 5.

BOY SCOUTS OF AM., CUB SCOUT LEADER HOW-TO BOOK 2-1 (1999) [hereinafter HOW-TO].

BOY SCOUTS OF AM., YOUTH’S FRONTIER: MAKING ETHICAL DECISIONS 15 (1994) [hereinafter ETHICS] (stating that "[t]he issues we use for ethical decision-making are honesty, fairness, and respect for others.").

Id. at 15.

HOW-TO, supra note 121, at 11-30.


HOW-TO, supra note 121 at 11-30 (distinguishing “discrimination” from “disliking someone after you get to know him or her”).

SCOUTMASTER HANDBOOK, supra note 125, at 132.

HOW-TO, supra note 121, at 11-28.

SCOUTMASTER HANDBOOK, supra note 125, at 43.

ETHICS, supra note 122, at 15.

SCOUT HANDBOOK, supra note 2, at 46.

ETHICS, supra note 122, at 15.

Petitioner’s Brief, supra note 27, at 6.

See supra note 117 and accompanying text.


Transcript, supra note 30, at 11.

Id.

Id. at 3-4.
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"BOY SCOUTS OF AM., FAMILY LIFE: MERIT BADGE SERIES 9 (1991)."

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