

Expressive Association: The Right of a Congressionally Chartered Membership Organization to Discriminate

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INTRODUCTION

The Boy Scouts of America is a private youth-serving, not-for-profit membership organization. It is portrayed in many Norman Rockwell paintings as an icon of traditional American values similar to mom, apple pie, and baseball. Comparable to Young Men's Christian Association, Campfire Boys and Girls of America, 4-H, Boys and Girls Club of America and others, it is primarily an informal educational organization with the purpose of instilling values in young people by engaging them in activities such as camping, hiking and fishing . At the heart of the Boy Scout organization is the right of expressive association: That is the right to determine beliefs and values and, therefore, membership. This right has been challenged in the courts many times in what has become known as the three G cases—Girls, Gays and Godless—as the organization has stood firm in its right to deny membership to girls, atheists and homosexuals (Anderson, 2000). This article will discuss the Supreme Court decision of *Boy Scouts of America and Monmouth Council, et al. v. James Dale* which supported the right of the Boy Scout organization to deny membership to homosexuals and the aftermath of the ruling.

BOY SCOUTING BACKGROUND

Scouting was founded in England in 1907 by Robert Baden-Powell, a British Army officer. Powell was appalled at the ill-prepared recruits he trained during the Boer War. As a result he began scouting for boys to teach them life-skills such as basic first aid and elementary survival skills. Scouting

was brought to the United States by William Boyce in 1910 and granted a Congressional Charter in 1916 (36 U.S.C. §30902, 2003). Scouting is an educational program primarily for boys. The fundamental purpose of Scouting is threefold: 1) to build character; 2) to train in responsibilities of participating citizenship; and 3) to develop personal fitness. It is the mission of Scouting to instill values in young people to prepare them to make ethical choices. The values are based on the Scout Oath and the Scout Law. The Boy Scout Oath states, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law, to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." The twelve tenets of the Boy Scout Law state that "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent" (Boy Scouts of America, 2003).

The Boy Scout Program is divided into five program areas: 1) Tiger Cubs for 7 year old boys and an adult partner; 2) Cub Scouts for 8 to 10 year old boys; 3) Boy Scouts for 11 to 18 year old boys; and 4) Varsity Scouting for 14 to 17 year old young men; 5) Co-ed Explorer/Venturing for 14 to 20 year old males and females (Boy Scouts of America, 2003).

Boy Scouts of America claim about \$441 million in total assets. It encourages community support; thus, 50% of its troops are sponsored by churches and about 14 % are sponsored by schools and Parent Teacher Organizations. Scouting receives approximately \$83 million in United Way Funds annually. It reports a membership of about 6.2 million each year and purports that some 110 million people have been members since its founding in 1910 (Boy Scouts of America, 2003).

CONGRESSIONAL CHARTER

Boy Scouts of America holds the distinction of being one of a few select organizations that holds a Congressional Charter. Since the organization has a purpose that supplements and enlarges education and is benevolent in character and not for pecuniary profit of its members, Congress granted a Congressional Charter in 1916. In part the Charter reads,

The purpose of the corporation shall be to promote through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916 (36 U.S.C. §30902, 2003).

In so doing Congress gave exclusive right in perpetuity to emblems, badges, and words or phrases used by the Boys Scouts of America in its program (36 U.S.C. §30905, 2003). Congress recognized the organization's mission to develop character in youth through an established code of conduct (36 U.S.C. §30902, 2003). Each year BSA submits an annual report to Congress (36 U.S.C. §30908). The President of the United States is the honorary head of the Scouting organization. Hence the Boy Scout organization is deeply entrenched in American tradition (Boy Scouts of America, 2003).

SUPREME COURT CASE

On first inspection the Boy Scout organization is seemingly open to anyone who is willing to pay the membership fees. However, girls and atheists have been denied membership and have unsuccessfully attempted to force entry into the Boy Scout ranks through legal procedures (*See Schwenk v. Boy Scouts of Am.*, (1976); *Quinnipiac Council, Boy Scouts, Inc. v. Comm'n on Human Rights & Opportunities* (1987); *Yeaw v. Boy Scouts of Am.* (1997); *Welsh v. Boy Scouts of Am.* (1993); *Randall v. Orange County Council, Boy Scouts of Am.* (1994)). In the latest legal skirmish, *Boy Scouts of America & Monmouth Council, et al. v. Dale* (2000), the Supreme Court was asked to settle the issue of gay membership.

James Dale became a member of Boy Scouts in 1978 at the age of eight and remained a Scout until he turned 18 years of age. He was an exemplary Scout who earned 25 merit badges, was admitted to the prestigious Order of the Arrow, and received one of Scouting's highest honors when he attained the rank of Eagle Scout. In 1989 he applied for adult membership and became the assistant scoutmaster for a Boy Scout Troop (*Boy Scouts of Am. & Monmouth Council, et al. v. Dale*, 2000, p. 665).

Dale subsequently enrolled in Rutgers University where he became the co-president of the Rutgers University Lesbian/Gay Alliance. His position as assistant scoutmaster of the New Jersey troop was revoked after he was quoted in a newspaper article as being a homosexual and gay rights activist. In a letter from the executive director of the Monmouth Boy Scout Council, Dale was notified that his adult membership had been revoked stating that Boy Scouts forbid membership to homosexuals (*Dale*, 2000, p. 645). In particular, the Boy Scout Oath and Law stipulates that a Boy Scout must be "morally straight" and "clean" (p. 667).

In 1992 Dale filed a complaint in the New Jersey Superior Court alleging that the Boy Scouts had violated New Jersey's public accommodations statute and its common law in denying membership based solely on his sexual

orientation (*Dale*, 2000, p. 643). Many states have felt a compelling interest in eradicating discrimination and have therefore passed civil rights statutes (*Dale*, p. 663). New Jersey was one such state that specifically named affectional or sexual orientation in its public accommodation statute.

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right (N.J. STAT. ANN. §10:5-4, 2003).

In June of 2000 by a 5 to 4 decision, the Supreme Court found that application of New Jersey's public accommodation law to require the Boy Scouts to admit the assistant scoutmaster violated the Boy Scouts' First Amendment right of expressive association, as, among other matters, (1) the Boy Scouts (a) engaged in expressive activity, and (b) sincerely asserted the view that homosexual conduct was inconsistent with the Boy Scouts' values; (2) requiring the Boy Scouts to accept the assistant scoutmaster would significantly affect the Boy Scouts' expression, by interfering with the Boy Scouts' choice not to propound a point of view contrary to the Boy Scouts' beliefs; and (3) the state interests embodied in the public accommodations law did not justify such a severe intrusion (*Boy Scouts of Am. & Monmouth Council, et al. v. Dale*, 2000, p. 667).

An organization is granted, under the Federal Constitution's First Amendment, the right of expressive association (*Dale*, 2000, p. 667). An organization can include or exclude whomever it wants (*Dale*, p. 640). In addition an organization has the right to no intrusion into the internal affairs or belief system of an organization. The Supreme Court asserted that whether the public or judiciary approved or disapproved of an organization's beliefs, does not justify a state invoking public accommodation states in an effort to supercede expressive association rights (p. 642).

In the dissenting view, the Supreme Court justices agreed that the Boy Scouts had the right to expressive association (*Dale*, 2000, p. 690). However, prior to *Dale*, the Boy Scouts had not made an official statement against homosexual conduct nor was there evidence that Dale would espouse his homosexual orientation to other members. Because a troop leader has a

private conviction concerning religion, politics or sexual orientation does not necessarily mean that it will be manifested to other members (*Dale*, p. 690). This would be counter to Boy Scout policies of avoiding questions from boys on such issues. The dissenting justices also warned that the right of expressive association can easily become a way to skirt anti-discrimination laws (p. 702).

REPERCUSSIONS

The aftermath of the *Boy Scout* decision could be seen in local papers across America. Articles discussed the discrimination and whether the BSA should be treated differently than in the past for its views. Non-discrimination and inclusion are emerging American values that have been codified through Civil Rights legislation. In addition, the Boy Scouts are often funded by groups such as United Way that oppose discrimination and such intolerance had reverberating effects across the country.

To determine how people responded to the decision of the Boy Scouts and its affirmation by the courts, the news library at <http://nl.newsbank.com/nlsite/index.html> was used. This reporting service includes newspapers from most major cities in the country. Table 1 provides a list of city newspapers that were analyzed for purposes of this study. The newspapers were followed for one year after the *Dale* decision. The column titled "No Data" means that no newspapers were carried by this reporting service. "No Resp" indicates that the listed newspaper carried no articles about the Boy Scout decision other than its initial reporting. An "X" in either "United Way" or "School Support" indicates that these groups withdrew support of the Boy Scouts. "Law" indicates an ordinance or law was passed as a result of the Boy Scout decision. The column labeled "other reports" includes other sorts of responses to the decision.

TABLE 1: STATE REACTION

| State | Newspaper | No Data | No Resp | United Way | School Support | Law | Other |
|-------|--------------------|---------|---------|------------|----------------|--|---|
| AL | Birmingham | | X | | | | |
| AK | | X | | | | | |
| AZ | Tucson | | | X | X | City Ord: No support for groups who discriminate | Contributions to Scouts double |
| AR | Northwest AR Times | | X | | | | |
| CA | L.A. Times | | | | | City drops support | Fired gay Scout Exec Speilburg quit Scouts GS can't sell cookies at mall |
| CO | Denver | | | | | | Discussion falls on both sides of issue |
| CT | New Haven | | | Failed | | | "Scouts for All" rally failed |
| DE | | X | | | | | |
| FL | Miami Herald | | | X | X | City Ord: No support for groups who discriminate | BSA sue School Bd. Won - rent charged Gay Rights Reform on ballot Temple evicts Scouts |

| State | Newspaper | No Data | No Resp | United Way | School Support | Law | Other |
|-------|--------------------------------|---------|---------|---------------|----------------|----------------------|---|
| GA | Atlanta Journal & Constitution | | | Discuss | | | Temple ban Scouts |
| HI | | X | | | | | |
| IL | Peoria Journal Star | | | X | | | |
| ID | Pocatello Journal | | | Tried | | | ID State U tried to remove support from United Way |
| IN | Ft. Wayne Journal Gazette | | X | | | | |
| IA | Dubuque Telegraph Herald | | | Chair Resigns | | | IA 4-H cuts ties IA BSA ask for repeal |
| KS | Wichita Eagle | | X | | | | |
| KY | Lexington Herald-Leader | | | Discuss | | | |
| LA | Baton Rouge | | X | | | | |
| ME | Bangor Daily News | | | Discuss | | | |
| MD | Baltimore Sun | | | | | Pass Gay Rights Bill | |
| MA | Boston Globe | | | | | | Boston leaders request repeal Church cuts ties Don't tell policy |

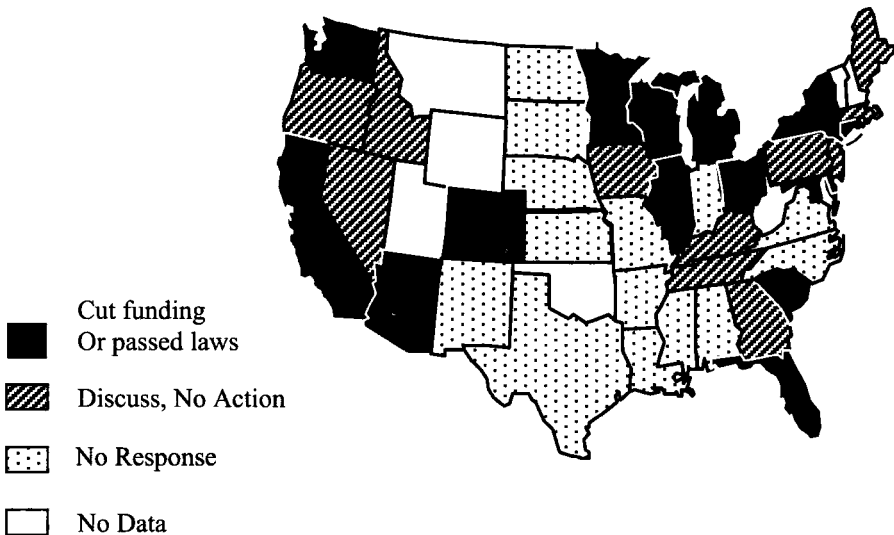
| State | Newspaper | No Data | No Resp | United Way | School Support | Law | Other |
|-------|---------------------|---------|---------|------------|----------------|------------------------------|---|
| MI | Detroit | | | Discuss | | Non-discrimination Ordinance | Teachers union request school not to support scouts |
| MN | St. Paul Pioneer | | | X | X | | |
| MS | Jackson | | X | | | | |
| MO | Kansas City Star | | X | | | | |
| MT | | X | | | | | |
| NE | Lincoln | | X | | | | |
| NV | Las Vegas Sun | | | | | | Mormons condemn policy |
| NH | | X | | | | | |
| NJ | Princeton | | | | | | City requested denouncing ban on gays – took away parking meters given in past for Xmas tree sale |
| NM | Albuquerque Journal | | X | | | | 12 people protest scouts at mall |
| NY | NY Times | | | | X | | 7 troops lose charter when reject ban |
| NC | Charlotte Observer | | X | | | | Temple supports Scouts |
| ND | Grand Forks | | X | | | | |
| OH | Dayton Daily News | | | X | | | |
| OK | | X | | | | | |

| State | Newspaper | No Data | No Resp | United Way | School Support | Law | Other |
|-------|-------------------------|---------|---------|------------|----------------|----------------------|---|
| OR | Portland Oregonian | | | Discuss | | Police sever support | Wells Fargo refuses to give to United Way Law suits to schools for allowing BSA |
| PA | Philadelphia Inquirer | | | Discuss | Discuss | | |
| RI | New Haven Register | | | X | Tried | | 2 troops refuse to comply |
| SC | Columbia | | | | X | | |
| SD | Aberdeen | | X | | | | |
| TE | Memphis | | | | | | Co. withdraw United Way support |
| TX | Ft. Worth Star-Telegram | | | | | | Demonstration Temple breaks ties |
| UT | | X | | | | | |
| VT | | X | | | | | |
| VA | Ronanoke | | X | | | | |
| WA | Seattle Post | | | X | Discuss | | |
| WI | Wisconsin State Journal | | | X | | | Church severs ties |
| WY | | X | | | | | |
| DC | Washington Post | | | X | | | |

X in United Way and School Support = withdrawal of support

FIGURE 1: RESPONSE TO BOY SCOUTS AFTER THE DALE CASE

{Figure 1 is a map that summarizes the reactions by state to the Boy Scout decision.}



News Library did not carry states where the map (Figure 1) lists no data. The major newspapers in each state were followed for a year after the decision.

According to this particular analysis, the country was divided in its reaction to the decision made by the Boy Scouts and affirmed by the courts to exclude homosexual membership. Some community papers had no articles that discussed the decision. Some states did not even seem to acknowledge that there was an issue. In these state newspapers, there were no articles in the papers nor "letters to the editor" that mentioned the Supreme Court decision beyond the initial report. Some state newspapers discussed the BSA discrimination case but it seems that the individuals within the particular state decided not to react. In Arkansas, the *Northwest Arkansas Times* headline read "No Problems Seen in State Over Scouts' Stand On Gays" (Caillouett, 2000). Caillouett discusses the problems the boy scouts are facing and states

that Arkansas has chosen not to respond. Others had significant reactions from cutting United Way funding to closing their public schools for use by the Boy Scouts or passing non-discrimination laws (Table 1).

Each scouting group in the country had to determine how they would handle gay leaders. In the states with no response, either the subject did not come up or they were following the national organization's policy with little resistance. In Lincoln, NB for example the local commentator, George Green (2002), explained the controversy and listed how local scouts were supported and discussed the continuing support regardless of the sentiments across the country. He states, "Regardless of the conflict surrounding the ban, the United Way and other community organizations said they'll continue to support the Boy Scouts, whose positive benefits far outweigh the gay controversy" (Green, 2002). In other states troops developed a "do not tell policy." In Massachusetts the Minuteman Council comprised of 330 Scout troops in greater Boston said the scouts will not inquire into a person's sexual history. "Discussions about sexual orientation do not have a place in scouts" ("Boy scout council adopts 'Don't Ask' rule, 2001, p. A14). Still others choose to ignore the policy completely and in New York seven troops lost their charters for such actions (France, Ordonex, Kovach, & Bireda, 2001).

UNITED WAY SUPPORT

United Way was a big supporter of the Boy Scouts of America. To be funded by the United Way a community-based organization must be a non-profit, tax-exempt charity governed by volunteers that submits to an annual, independent financial audit, provides services at a reasonable cost, and maintains a policy of non-discrimination (United Way of America, 1999). When the Boy Scout organization decided not to allow gay membership, it conflicted with the United Way's mission of non-discrimination. Since United Way is community-based, each local United Way agency determines what they will fund. United Ways in San Francisco, Santa Clara and Santa Cruz, CA; New Haven, CT; Branford, CT; Santa Fe, NM; Portland, ME; and Somerset County New Jersey adopted anti-discrimination policies that affected their funding relationship with the Boy Scouts (NewsLibrary). These anti-discrimination policies include prohibitions from discrimination based on age, gender, race, religion, sexual orientation, ethnicity, national origin, or disability. Since the *Boy Scouts of America* decision, United Way member organizations in Fall River, MA; and Providence, RI also have taken similar steps (United Way of America, 2001).

While some United Way agencies decided to continue funding, some companies who give to the United Way decided they would not. In Portland, Oregon, for example, Wells Fargo Bank and Portland General Electric restricted the agency from giving any of their donations to the Boy Scouts. Wells Fargo alone had pledged \$400,000 as long as none of it went to the Scouts. (Wells Fargo and PGE divert funds from scouts, 2000, p. B01). This indicates that where the funds were not cut directly, they may have been cut indirectly.

SCHOOLS

As the United Way organizations across the country were grappling with what to do with support of the Boy Scouts, so too, were the schools. Many schools open their doors after hours for use by community groups, the Boy Scouts being one of those groups. Many schools also allow membership recruitment through dissemination of information. Again, this is a district by district decision as each district has their own policies as to who can use the schools. Although some do not allow use by outside groups, many of the ones who do, only allow groups who do not discriminate. Seven communities had newspaper articles indicating the schools would no longer support the Boy Scouts because of the discrimination policy (Table 1). According to the Gay, Lesbian and Straight Education Network, at least 4,418 schools nationwide ended their relationship with the scouts (France, et. al., 2001).

Some Parent/Teacher Organizations (PTOs) must also decide their positions in regards to Boy Scout sponsorship. Several PTOs who have strict non-discrimination policies, and have written to the scouting organization espousing their disfavor of the Boy Scout Policy, have lost their troop's charter (Scouts ousted due to gay view, 2001, p. 1A).

CHURCHES

Churches, like schools, are organizations that provide the Boy Scouts with support and places to meet. As stated previously, the Boy Scouts believed that a member must declare they believed in God, and thus, that there is a natural connection between scouts and religious groups. However, many churches, similar to the United Way and Schools, have non-discrimination policies. They also had to make decisions about how to handle this new event. Some churches agreed with *Dale* decision. They, also, did not believe that men who admit being homosexuals should be a leader of the children. The Catholic Church, Presbyterian Church and Mormons all support the decision. However, other groups have come out to encourage the scouts to change their

mind or have condemned their stance. Methodists, who support 37,000 Scout troops, were against the discrimination stance of the Scouts. Other groups indicated agreement with the Methodists including the Episcopal Dioceses, United Church of Christ, Southern Baptists, Unitarian Universalists, and the Reformed Jews (France, et. al., 2001).

LEGISLATURE

As the aftermath of the decision continued, members of the legislature also got involved. First, there was the vote on revoking the Federal Charter of the Boy Scouts when the "Scouting for All Act" was introduced by Lynn Woolsey (CA) (Scouting for All Act, 2000). Her reasoning had to do with condemning the scouts for their discrimination. This would "send a clear message that Congress does not support intolerance" (Scouting for All Act, H6565, 2000). She likened this to the time the Daughters of the American Revolution (DAR) (another charter holding group) did not allow Marian Anderson, a black opera singer, to perform at Constitution Hall. Eleanor Roosevelt, first lady, resigned her membership from the DAR and invited Marian to sing at Lincoln Memorial. Seventy-five thousand people attended the concert. Subsequently, the DAR changed their policy of discrimination (Scouting for All Act, H7450, 2000).

The question becomes should a group hold such an esteemed honor and be allowed to discriminate. The House of Representatives said yes in their vote against revoking the charter (Scouting for All Act, H7521, 2000). Only 11 democrats and one republican voted for the bill. More interesting, however, was that 50 democrats and one republican voted "present" rather than to oppose it (Scouting for All Act, H7521).

Following the vote, both the American Atheists and Lynn Woolsey, with ten other representatives, wrote two different letters to President Clinton asking him to resign as the honorary head of the Boy Scouts (American Atheists, Inc., 2002). This was probably spurred by the Marian Anderson and Eleanor Roosevelt stories (Scouting for All Act, H7450, 2000). The President apparently ignored the request although he did sign an Executive Order on June 23, 2000 to look into the joint activities between the United States government and the Boy Scouts (Exec. Order No. 13160, 2000). President Clinton stated that there would be no discrimination in these activities including discrimination based on sexual orientation.

The United States government is a large supporter of the Boy Scouts of America. The biggest contribution is in the form of use of land for the Boy Scout Jamboree, which occurs once every four years on federal property. The

government provides the land, some supplies and some leadership for this event (France, D. et al., 2001).

In response to the school systems that were stopping the scouts from meeting in their facilities, Jesse Helms wrote an amendment to the education amendment act "Boy Scouts of America Equal Access Act" (20 U.S.C. §7905, 2003). It would withdraw Department of Education funding to government entities that do not offer the BSA the use of public facilities on an equal basis with other groups. This act, which passed with the Educational Amendments Act was buried in the extensive document and stated:

(b) In general

(1) Equal access

public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department [of Education] shall not deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America . . . that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America (20 U.S.C. §7905(n)(1)).

OTHER RESPONSES

Because there were people who believed in equal opportunity and the rights of all boys to participate in Boy Scouts, "Scouting for All," a new organization based on the Boy Scout program, but with a non-discrimination policy, was developed. It now has about 75,000 members (Scouting for All, 2003). There has also been a drop in the overall number of participants in the BSA (Boy Scouts of America, 1999-2002).

In addition, according to their local papers, Tucson, Miami, Detroit and Maryland have each passed non-discrimination laws for sexual orientation as part of the response to the *Dale* decision (See Table 1).

CONCLUSION

It is ironic that an organization that our country holds as an icon of American values would have a policy so counter to the belief that "all men are

created equal" and should have equal rights to the benefits of what society offers. The United States government supports the Boy Scouts through legislation and Federal Charter. The Boy Scouts utilize their first amendment rights to expressive association. Scouting for All states that just because they can discriminate, does not mean they should (Scouting for All, 2002). And as Lynn Woosley said, "The real question is not whether the Boy Scouts have a right to their discriminatory policy but whether their discriminatory policy is right" (Woosley, 2000).

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